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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

GAETANO LOMBARDO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari from the
United States Court of Appeals
for the Eleventh Circuit

PETITION OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I

Is a close personal friendship and an attorney-client relationship, between Trial Defense Counsel and the government's informant in a "reverse sting" case, sufficient to create a conflict of interest which causes counsel to be "ineffective" pursuant to Amendment 6 of the United States Constitution.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION OF WRIT OF CERTIORARI

GAETANO LOMBARDO, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered in *Gaetano Lombardo v. United States*, Case Number 02-16246 EE decided on May 6, 2003 which affirmed the order of the United States District Court for the Southern District of Florida, wherein Petitioner's motion for relief pursuant to 28 U.S.C. § 2255 was denied.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit which affirmed the Order of the United States District Court for the Southern District of Florida which denied relief under 28 U. S. C. § 2255 is contained in the appendix.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 USC § 1254 (1).

STATEMENT OF THE CASE

The Petitioner, has been sentenced to serve 188 months in the Federal Bureau of Prisons for his conviction for Conspiracy to Distribute Cocaine and for his conviction of Possession With Intent to Distribute Cocaine. Petitioner filed a Motion Pursuant to 28 U.S.C. § 2255 to Vacate and Set Aside his conviction and sentence when the Petitioner learned that his Defense Counsel during the criminal trial had labored under an actual conflict of interest in representing the Petitioner. (R-1-1).

The Petitioner was represented by John Francis O'Donnell (hereinafter "O'Donnell") throughout the criminal trial and sentencing procedure. (R-2-30-6).

The only defense presented during the criminal trial on behalf of the Petitioner was a defense of "entrapment". There were no other defenses presented on behalf of the Petitioner. (R-2-30-21). It was the Theory of Defense at the criminal trial that the Petitioner was entrapped by Richard Rendina (hereinafter "Rendina")with the aid of Robert Collazo (hereinafter "Collazo"). (R-2-30-27). The Petitioner informed O'Donnell of Rendina's involvement in entrapping the Petitioner at the first meeting between Petitioner and O'Donnell. (R-2-30-103).

Rendina, the person who entrapped the Petitioner, was and is a very close personal friend of O'Donnell. (R-2-30-16). Not only were

Rendina and O'Donnell close personal friends but they viewed themselves and their families as an extended family. (R-2-30-16). The O'Donnell and Rendina families would socialize together, which included taking family vacations together, not only with the Rendina family, but also with Rendina's brother and his family. (R-2-30-16) and (R-3-26-62). Rendina and O'Donnell played golf together frequently, (R-2-30-16) and (R-3-26-62), and talked on a daily basis. (R-3-26-42). O'Donnell had borrowed money from Rendina before. (R-3-26-63). According to O'Donnell, he met Rendina in 1980 or 1981 when Rendina was employed as an Assistant State Attorney in Broward County, Florida. (R-2-30-14). According to Rendina he and O'Donnell met in 1976. (R-3-26-62). In 1982 or 1983, after Rendina had left the State Attorney's Office, Rendina and O'Donnell shared office space. (R-2-30-12) and (R-3-26-40). Rendina has referred cases to O'Donnell during the course of their relationship. (R-2-30-15). Likewise, before Rendina became disbarred, O'Donnell would refer cases to Rendina. (R-2-30-14). Rendina continues to refer cases to O'Donnell. (R-2-30-15). Rendina has been employed by O'Donnell. (R-2-36-16) and (R-3-26-40).

Prior to being retained by the Petitioner and during the representation of the Petitioner by O'Donnell, Rendina would talk to O'Donnell about Rendina's various legal problems and ask O'Donnell for legal advice on same. (R-2-30-16). This included Rendina's then current case, Case No. 94-6170-CR-HURLEY, which was discussed in detail with O'Donnell (R-3-26-66) and (R-2-30-(21-22)), and for which Rendina was ultimately convicted of making a false statement on a tax return. (R-3-26-39).

The Petitioner had informed O'Donnell that he did not want to testify in his own defense. (R-2-30-(27 and 107)). Petitioner was forced to take the stand and testify because O'Donnell was unable to convince Judge Gonzalez at the close of the Government's case, that an entrapment instruction was warranted. (R-2-30 (27-28)). Until the time when a mistrial was granted as to the Co-Defendant, the Petitioner had been of the belief that Rendina was subpoenaed to testify and would testify. (R-2-30-108) , (R-3-26-6), and (R-2-30-(87-88)). Very little

time was spent in preparing the Petitioner to testify. (R-3-26-(26 and 87).

The Petitioner had hired Ron Cacciatore (hereinafter "Cacciatore"), an investigator with World Wide Investigations to assist in the defense of his case (R-2-30-103). Cacciatore was told by Petitioner to specifically investigate Rendina and other individuals involved in Petitioner's case (R-2-20-108). O'Donnell told Cacciatore not to investigate Rendina. (R-2-30-29) and no such investigation was done. (R-2-30-80).

On February 5, 1998 and April 23, 1998, O'Donnell in the case of United States Richard Rendina, Case No. 94-6170-CR-HURLEY, on behalf of Rendina, filed motions requesting that Rendina be authorized to travel. (R-2-30-30). At the time when said motions were filed on behalf of Rendina, O'Donnell was representing the Petitioner. (R-2-30-30). On April 23, 1998 O'Donnell, on behalf of Rendina, in United States v. Richard R. Rendina, Case No. 94-6170-CR-HURLEY, filed a Motion to Terminate Rendina's Supervised Release. (R-2-30-31). As a basis for that motion, O'Donnell sets forth the assistance that Rendina gave to the Government against the Petitioner in the very case in which O'Donnell represented the Petitioner. (R-2-30-32) and (R-3-26-69). O'Donnell used the assistance rendered by Rendina to the Government in the Petitioner's case to mitigate the punishment for his best friend and client. (R-2-30-32).

O'Donnell has alleged that he interviewed Rendina regarding Rendina's involvement with the Petitioner's case. However, no one was present at said interview, not even the investigator, Ron Cacciatore (R-2-30-(83-84)). O'Donnell made no notes whatsoever of his alleged interview with Rendina. (R-2-30-46). O'Donnell never questioned Rendina in depth regarding his involvement in the Petitioner's Case. He relied upon Rendina's representation that Rendina's testimony would not be helpful (R-3-26-43). Because O'Donnell did not conduct an in depth interview of Rendina he did not learn that Peter Roussonicolos (hereinafter "Roussonicolos") a former client and a long time friend of Rendina (R-3-26-44), whom Rendina felt extreme loyalty to because of

Roussonicolos's refusal to testify against Rendina in a prior cocaine case (R-3-26-46), had introduced Rendina to the Petitioner. (R-3-26-44). When Roussonicolos came to Rendina for advice, Rendina felt that Roussonicolos was involved in a situation that could have bad results. (R3-26-47). Rendina suggested that he and Roussonicolos contact law enforcement through Collazo. (R-3-26-45). From the start, Rendina had his own agenda and reasons for contacting law enforcement. These included the hope that he would be able to mitigate his own sentence (R-3-26-46 and 57) and that Rendina could recoup some of the money that he had invested in a Panamanian gaming venture with Collazo. (R-3-26-46). When Roussonicolos introduced Rendina to one of the Lombardos (R-3-26-48), they spoke of a potential gaming opportunity in Panama and also a transaction involving cocaine. (R-3-26-48). Collazo was not present during this meeting and Rendina was not sure how the subject of a cocaine transaction came up. (R-3-26-48). It was Rendina that used the word "cocaine" at this meeting. Lombardos never did use the word "cocaine". (R-3-26-71). At that same or a subsequent meeting it was Roussonicolos that brought up the subject of a cocaine transaction. (R-3-26-49). This meeting was not surveilled or participated in by DEA. (R-3-26-51). Rendina claims that prior to meeting with the Lombardos he had already met with DEA. (R-3-26-52). DEA never asked Rendina to wear a wire or recording device when he met with the Lombardos. (R-3-26-53). Rendina was intimately familiar with "reverse stings" and how they worked including the compensation paid to an individual for setting up the "reverse sting", from his time in the Broward County State Attorney's Office. (R-3-26-58). Rendina ultimately received approximately $7,500.00 from Collazo in monies that Collazo received from setting up the reverse sting for the Government. (R-3-26-76-78). Rendina had contacted Collazo about the Petitioner approximately one month prior to any meeting being scheduled with the DEA. (R-3-26-91). During the alleged first meeting between Collazo and Petitioner, the conversation went right to the business of the cocaine transaction. There were no introductions from Collazo such as, "I am the person that Richard Rendina referred to". (R-3-26-105).

Although O'Donnell claims the Petitioner was aware of his

friendship with Rendina, O'Donnell never explained to the Petitioner the magnitude of the relationship between O'Donnell and Rendina. (R-2-30-10). The Petitioner did not ascertain that Rendina and O'Donnell shared office space, went on vacations, played golf or employed Rendina until after current counsel was retained. (R-2-30-(104 and 105)) and (R-3-26-18). When Petitioner questioned O'Donnell about the relationship between O'Donnell and Rendina, the Petitioner was told by O'Donnell "not to worry about it." (R-2-30-104). It was not until Petitioner retained new counsel to prosecute his appeal, and an investigation was conducted, that Petitioner learned the extent of the relationship between O'Donnell and Rendina. (R-2-30-105) and (R-3-26-18). The Petitioner has stated that if the extent of the relationship between Rendina and O'Donnell had been explained to him, he would have immediately sought the assistance of different counsel. (R-2-30-106) and (R-3-26-86). O'Donnell never offered the Petitioner the opportunity to retain a conflict free attorney after O'Donnell had indicated that he and Rendina were friends. (R-2-30-50). O'Donnell made no notes of any conversations that he and the Petitioner had regarding O'Donnell's friendship with Rendina. (R-2-30-48).

Even though the conflict of interest issue was brought before Judge Gonzalez (R-4-28-50) and Magistrate Judge Vitunac (Transcript of Hearing on Motion to Reduce Bond, pgs. 35-42) there was no inquiry made of the Petitioner by either judge as to whether Petitioner realized the extent of the conflict and understood that he had a right to conflict-free counsel. (R-2-30-(54 and 107) and (R-4-28-74).[1] No judge explained the conflict of interest to the Petitioner (R-2-30-107). In fact, the Petitioner was not present at the Calendar Call when Judge Gonzalez questioned O'Donnell as to whether O'Donnell had a conflict of interest in representing the Petitioner because of O'Donnell's close personal friendship with Rendina. (R-4-28-67). The information shared

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[1]Initially, neither Judge Gonzalez nor Judge Vitunac were made aware of the full extent of the relationship between O'Donnell and Rendina. Neither Judge was aware that O'Donnell was representing Rendina.

with Judge Gonzalez only mentioned and addressed a small portion of the relationship between O'Donnell and Rendina and certainly did not present a clear picture of the relationship between O'Donnell and Rendina. (R-2-30-73). This hearing was not reported nor was any order entered by Judge Gonzalez as a result of this discussion. (R-4-28-(50 and 67-72). Substantially the same conversation regarding O'Donnell's conflict of interest occurred before Magistrate Judge Vitunac, (R-4-28-71) although there was no mention of playing golf together at the Calendar Call. (R-4-28-71). The Petitioner was present when Judge Vitunac, at a bond hearing, addressed the conflict of interest issue. (R-3-26-9). The Petitioner has stated that he did not understand what was being talked about (R-3-26-9) nor did he participate in said hearing. (R-2-30-54). The Defendant's education was through the fifth grade in Italy. (R-3-26-82). His native language is Italian. (R-3-26-82). The English which the Petitioner knows was gained from what he has picked up since coming to this country. (R-3-26-82). At the time of the bond hearing, there was one interpreter present who was located between the Petitioner and Co-Defendant, (R-3-26-3) and was primarily interpreting for the Co-Defendant. (R-3-26-(8-9)). The Petitioner trusted O'Donnell to look after the Petitioner's best interest. (R-2-30-113) and (R-2-30-97).

AUSA Scott Behnke testified that Judge Hurley was informed of Rendina's role in the Petitioner's case at the Motion to reduce the sentence of Rendina pursuant to Rule 35. (R-5-34-4). Judge Hurley was told during this motion hearing that Rendina had introduced Collazo to the Petitioner and but for this introduction, there would have been no case against the Petitioner. (R-5-34-(7-8)).

REASON FOR GRANTING THE WRIT

QUESTION ONE

Criminal Defendant's Right to be Represented by Counsel

Petitioner was denied effective assistance of counsel at trial because his Trial Defense Counsel, John O'Donnell, Esquire, had a

conflict of interest which resulted from his close personal friendship and representation of Richard Rendina, a disbarred Florida attorney, who is the individual that entrapped the Defendant while working with the Government.

The close personal relationship between O'Donnell and Rendina caused O'Donnell to make certain strategic decisions in Petitioner's trial when other reasonable alternatives were available. These decisions included the refusal of O'Donnell to conduct an in depth pretrial interview of Rendina; refusing to allow a paid investigator to conduct such an interview or any investigation what-so-ever into Rendina; and O'Donnell's refusal to call Rendina as a witness.

Counsel's Duty of Loyalty to Client

Amendment 6 of the United States Constitution provides that a Defendant shall have the right to the assistance of counsel for his or her defense. The United States Supreme Court has found that the assistance of counsel is necessary in order for a Defendant to receive a fair trial. Mickens v. Taylor, 1222 S.Ct. 12137 (2002). Assistance of counsel which is ineffective in preserving fairness and the reliability of the outcome of the trial or proceeding does not meet the constitutional standard of the Sixth Amendment. Mickens.

Attorneys owe their clients a duty of loyalty, including the duty to avoid conflicts of interest. The duty of loyalty is perhaps the most basic of counsel's duties. Strickland v. Washington, 466 U.S. 668 (1984). The right to effective assistance of counsel encompasses the right to representation by an attorney who is free from any actual conflicts of interest which may effect the attorney's representation of the Defendant. Cuyler v Sullivan, 446 U.S. 335 (1980).

Effective Assistance of Counsel

Normally, for a Defendant to prevail on a claim of ineffective assistance of counsel, the Defendant must show that Trial Defense Counsel's performance was deficient, falling below an objective

standard of reasonableness, and that the deficient performance prejudiced the Defendant. Strickland. The Defendant must show that there is a reasonable probability that, but for, counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland.

An attorney's duties to his client include consulting with the client on important decisions, keeping the client informed of important developments in the case, and conducting a reasonable investigation into the facts of the case. Strickland. O'Donnell not only did not consult with the Petitioner concerning O'Donnell's decision not to call Rendina as a witness, he affirmatively misrepresented that decision to the Petitioner. Additionally, O'Donnell did not interview Rendina and directly instructed the investigator hired by Petitioner not to interview or investigate Rendina.

Conflict of Interest

In Cuyler v. Sullivan, 446 U.S. 335 (1980), this Court held that for relief to be granted based upon a conflict of interest with no objection being raised in the Trial Court, a Defendant must demonstrate that a conflict of interest actually effected the adequacy of representation provided by the attorney. This decision was recently reaffirmed in Mickens.

The rulings of this Court have consistently held that for a Defendant to demonstrate that he received ineffective assistance of counsel under the 6th Amendment to the United States Constitution because of a conflict of interest, the Defendant must show that there was an actual conflict of interest and that conflict of interest actually effected the adequacy of the representation the defendant received. Cuyler and Mickens.

This Court in Mickens stated that a defendant's case was not to

be reversed on appeal for a Trial Court's failure to conduct an evidentiary hearing into a potential conflict of interest unless the potential conflict of interest was brought to the Court's attention by means of an objection. In this case the Defendant did not impose an objection because he was not aware of the conflict. However, the Government, aware of the potential conflict, did object and bring this matter to the attention of both Judge Gonzalez and magistrate Judge Vitunac. Neither judge made inquiry of the Petitioner as to his knowledge of the conflict or his desire to waive the conflict of interest.

Obviously, if a Trial Court conducted an evidentiary hearing and found that there was a conflict of interest then one must assume that the Trial Court would take the needed steps to protect the rights of the Defendant, by informing the Defendant of his absolute right to have conflict free counsel. If the Trial Court found no actual conflict of interest, the record would be preserved for appellate review. Second, the Court reiterated that in cases involving a conflict of interest, the standard that a defendant must prove or show is that there was a conflict of interest that actually effected counsel's performance, as opposed to a mere theoretical division of loyalties.

In fairly obvious and simple terms, this Court has said that in order for a Defendant to receive relief based upon ineffective assistance of counsel due to a conflict of interest the Defendant must show either at the Trial Court level where an objection has been raised or at the Appellate level that an actual conflict of interest occurred. Mickens. Without such a showing no relief will be granted. This Court has defined a conflict of interest as a conflict that effects counsel's performance, as opposed to a mere theoretical division of loyalties. Mickens.

A conflict of interest has been shown to exist between the Petitioner and O'Donnell. O'Donnell, based upon O'Donnell's close personal relationship with Rendina and his representation of Rendina and the Petitioner, has and had a desire to protect Rendina, the individual who entrapped the Petitioner. The loyalty which O'Donnell has and had to Rendina stems from the following:

O'Donnell and Rendina have been very close friends for 24 years. (R-3-(26-39)) and (R-2-30-(14, 16, and 22)). O'Donnell first met Rendina when Rendina was an Assistant State Attorney in Broward County, Florida and they tried cases against each other. (R-3-26-42) and (R-2-30-14). When Rendina entered private practice, O'Donnell and Rendina tried cases together. (R-3-26-42). By 1981 or 1982 Rendina had left the Broward County State Attorney's Office and shared space with O'Donnell. (R-3-26-62) and (R-2-30-14). Rendina has referred cases to O'Donnell both prior to and subsequent to Rendina's disbarment. (R-3-26-62) and (R-2-30-15). O'Donnell referred cases to Rendina prior to Rendina's disbarment. (R-3-26-62) and (R-2-30-14). The families of O'Donnell and Rendina are very close. (R-3-26-62) and (R-2-30-16). On numerous occasions, the two families have taken vacations together. O'Donnell and Rendina play golf together on a regular basis and have done so for a number of years. (R-3-26-42) and (R-2-30-16). O'Donnell has borrowed money from Rendina in the past. (R-2-30-16). O'Donnell has hired Rendina to do paralegal work for O'Donnell subsequent to Rendina's disbarment. O'Donnell and Rendina talk on a daily basis. (R-3-26-42). O'Donnell considers himself as part of Rendina's extended family and is good friends with Rendina's brother and his family. (R-2-30-16).

O'Donnell indicated that he might have represented Rendina prior to commencing the representation of the Defendant. (R-2-30-15). Rendina has had a series of personal and legal problems over the years and O'Donnell has rendered legal advice to Rendina in connection with all of Rendina's problems. (R-2-30-16). Rendina spoke with O'Donnell regarding all of Rendina's legal problems, including his tax evasion case in the Federal District Court and his involvement in the Lombardo case. (R-3-26-41, 66) and (R-2-30-16).

At the time O'Donnell undertook to represent the Defendant in the instant case, Rendina had a case pending in the United States District Court for the Southern District of Florida. (R-3-26-(59 and 60)). The case number for Rendina's case was 94-6170-CR-Hurley. O'Donnell had conferred with Rendina regarding the aforementioned tax evasion case prior to commencing his representation of the

Defendant. (R-3-26-66) and (R-2-30-21). In fact, O'Donnell consulted with the attorneys of record for Rendina on the tax evasion case on more than one occasion. (R-3-26-(41 and 66)) and (R-2-30-22). This is evidenced by both the testimony of O'Donnell and Rendina, along with various pleadings filed on Rendina's behalf in his case.

Specifically, Rendina, as early as May 26, 1995, sets forth in a written affidavit in his case, his conference with O'Donnell. (Affidavit of Rendina dated May 26, 1995). In paragraph "G" of that Affidavit, Rendina states:

"Based upon conversation(s) that the undersigned has had with attorney John O'Donnell, Esquire, the undersigned has learned that this court has had sufficient amount of time to conduct a hearing on the defendant's motion to reinstate appellate bond, but continued to fail to grant him such a hearing even though counsel for the Defendant repeatedly called the court's chambers requesting a hearing".

These conversation(s) between O'Donnell and Rendina, regarding Rendina's tax evasion case, occurred well before O'Donnell undertook to represent the Defendant in the instant case. Further, Rendina had sufficient reliance upon O'Donnell's opinion as to set that opinion out in his affidavit.

On July 22, 1997, a document entitled "Response to Court's Request," was filed on behalf of Rendina. In this document counsel indicates that Rendina is continuing to work with the government on at least one venture. (Response to Court's Request filed on Rendina's behalf dated July 22, 1997).

On February 5, 1998, approximately one month after the Defendant had been tried and convicted, and while O'Donnell was still representing Petitioner, O'Donnell, filed a motion on behalf of Rendina, in Rendina's tax evasion case requesting that Rendina be given permission to travel. (Motion for Permission to Travel dated February 5, 1998). (R-3-26-(66-67)) and (R-2-30-30). The Petitioner, GAETANO LOMBARDO, was not sentenced in the instant case until

May 22, 1998. At this time, O'Donnell was actually representing both the Defendant and Richard Rendina at the same time.[2] Additionally, O'Donnell on April 23, 1998, filed a second motion requesting that Rendina be given permission to travel. (Unopposed Motion to Travel filed on behalf of Rendina dated April 23, 1998).

The true tale of the dual representation between the Petitioner, GAETANO LOMBARDO, and Rendina, occurred on April 23, 1998 when O'Donnell , on behalf of Rendina, filed a motion entitled "Defendant's Unopposed Motion to Terminate Supervised Release, Local Rule 88.9 Certificate and Incorporated Memorandum of Law." (R-3-26-(67-69)) and (R-2-30-(31 and 44)). In paragraph 4 of that motion, O'Donnell, states,

"In addition, Rendina has cooperated with the United States Attorney's Office in connection with two cases, United States vs. Franco Nicoletti, Case No. 96-6199-Hurley and United States vs. Franco Lombardo, Case No. 96-8090-Cr-Gonzalez, for which he has not received any credit from this court with respect to any adjustment in his sentence."

O'Donnell admitted that he used Rendina's assistance to the

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[2]The filing of any pleading shall, unless otherwise specified, constitute an appearance by the person who signs such pleading. Rule 11.1D.1, Local Rules of the United States District Court for the Southern District of Florida. There was no such restrictive language in any pleadings signed and filed by O'Donnell on behalf of Rendina.

[3] Petitioner, GAETANO LOMBARDO, and Franco Lombardo were Co-Defendants in Case No. 96-8090-CR-Gonzalez and participated in a joint trial until the Honorable Jose Gonzalez, Jr. granted a mistrial as to Franco Lombardo on the fourth day of a six day trial. At the time O'Donnell filed this pleading on behalf of Rendina he was still representing the Petitioner, GAETANO LOMBARDO.

Government in the Petitioner's case to mitigate or attempt to mitigate Rendina's punishment in Case No. 94-6170-CR-HURLEY. (R-2-30-32).

O'Donnell testified that he, prior to representing the Petitioner, had spoken with Rendina and had been told by Rendina of Rendina's involvement in introducing the Petitioner to Collazzo. (R-2-30-(66 and 67)). Rendina had also informed him that he, Rendina, expected to receive a benefit from his assistance to the Government in the Petitioner's case. (R-2-30-66).

O'Donnell had at least a familiarity with Pete Roussonicolos. (R-2-30-(11-14)) When Rendina was practicing law, Rendina represented Roussonicolos for a period of 12 years. (R-3-26-44). Rendina testified that he felt a loyalty to Roussonicolos because Roussonicolos, had held tight (failed to give incriminating testimony against Rendina) in a case in the Broward County courts in which both Rendina and Roussonicolos were Co-Defendants. (R-3-26-(44-46)).

Addressing whether O'Donnell was laboring under a conflict of interest, Judge Gonzalez found that O'Donnell and Rendina were and are close personal friends, that the two routinely discussed, as friends, Rendina's various legal problems; that O'Donnell frequently offered Rendina legal advice about Rendina's legal problems; that O'Donnell signed three pleadings filed on behalf of Rendina in Rendina's tax case; and that O'Donnell argued that Rendina's supervised release be terminated early because of assistance that he had provided to the Government in the Petitioner's case. However, even considering the above, Judge Gonzalez found that O'Donnell never represented Rendina. (R-1-46-(43-45)). The basis of this conclusion of law by Judge Gonzalez was that Rendina testified that "he never retained O'Donnell, O'Donnell had never filed a Notice of Appearance on Rendina's behalf, and, most important, he has never considered his relationship with O'Donnell to be an attorney-client relationship." (R-1-46-(19-20)). This after the fact statement by Rendina is self serving at best. However, the facts presented at the hearing, and specifically the testimony of Rendina, directly rebuts the findings made by Judge

Gonzalez. Rendina, during his testimony at the evidentiary hearing, stated that prior to the Motion to Recuse Judge Hurley being filed, which included Rendina's Affidavit, Rendina and his formerly retained attorney consulted with O'Donnell in a conference call. (R-2-30-65). Judge Gonzalez indicates that Rendina testified he had never retained O'Donnell. (R-1-46-19). In actuality, what Rendina said was, "Never formally retained him. He was involved with a number of other lawyers in various legal matters I had, but never retained as a lawyer." (R-2-30-41). It is obvious that Rendina was talking about being formally retained with a retainer agreement and the payment of fees. Additionally, Rendina admitted that he had substantially discussed his tax evasion case with O'Donnell. (R-2-30-66).

Judge Gonzalez is incorrect that O'Donnell never filed an appearance on behalf of Rendina. O'Donnell entered his appearance on behalf of Rendina on February 5, 1998 in Case No. 94-6170-CR-HURLEY, when O'Donnell signed and filed the Motion for Permission to Travel on behalf of Rendina. (Local Rules of the United States District Court for the Southern District of Florida, Rule 11.1D.1.)

Judge Gonzalez, in footnote 8, suggests that a personal relationship, no matter how intimate, can ever give rise to a conflict of interest. (R-1-46-45). However, there was no citation to any authority for this conclusion of law. Petitioner would argue that an intimate personal relationship is as likely, if not more likely, to result in a conflict of interest than the relationship of a client with which the attorney has no other relationship other than the attorney-client relationship. It is undisputed that both Rendina and O'Donnell considered not only each other, but also the others family as close personal friends and extended families. Yet, the Government would have the Court believe that O'Donnell, a close personal friend of Rendina, who had been fully advised by Rendina as to Rendina's tax evasion case and was fully aware of the punishment Rendina was facing as well as the monetary losses which Rendina had suffered in the Panama gaming venture, completely ignored Rendina's plight in representing the Petitioner. Although, O'Donnell, would not directly admit at the evidentiary hearing that his loyalty to Rendina caused a conflict of interest, he did

state,

"I did everything that I could think of to cause the Government to call Mr. Rendina. Ultimately, at some point the Government counsel advised the Court that the Government was not going to call Mr. Rendina. But frankly I didn't believe her." (R-2-30-22).

O'Donnell is a licensed attorney in the State of Florida and is also admitted to practice in the Federal District Court, Southern District of Florida. As such, O'Donnell is held to have knowledge of the rules and statutes pertaining to trial procedure. Federal Rule of Evidence § 611 (c), states, "When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions." Certainly, Rendina would have been deemed a hostile or adverse witness as he was affiliated with the Government's case. O'Donnell's conflict of interest is apparent because of his refusal to call his best friend, Rendina, because of the adverse consequences Rendina might suffer if called as a witness in Petitioner's case. If, as O'Donnell states, "I did everything that I could think of to cause the Government to call Mr. Rendina," then it is clear that O'Donnell felt and knew that Rendina should be cross examined regarding his involvement in this case. His cross examination in this case was the only way that the Petitioner could receive a fair trial. Since O'Donnell felt that Rendina should be cross examined and that he did everything that he could think of to cause the Government to call Mr. Rendina, as a witness in the Government's case, then when the Government failed to call Mr. Rendina, O'Donnell should have called Rendina as a witness and availed himself of Federal Rule of Evidence § 611(c). O'Donnell did not do this because of his loyalty to Rendina and thus weakened the Petitioner's defense.

Further adverse effects upon the representation of the Petitioner caused by O'Donnell's conflict of interest are as follows:

1. The Petitioner hired Ron Cacciatore (hereinafter "Cacciatore"), as an investigator, and instructed Cacciatore to investigate Rendina, Roussonicolos,

Collazzo, Natale and Falks. (R-2-30-103). Although the Defendant had specifically instructed Cacciatore to investigate the above individuals, this instruction was countermanded by O'Donnell. Specifically, O'Donnell instructed Cacciatore not to investigate Roussonicolos or Rendina. (R-2-30-(28-29)) and (R-2-30-80). When questioned why such an instruction was given, O'Donnell indicated that he had all of the information he needed regarding Roussonicolos and Rendina, which included the certified copies of convictions as to each individual. (R-2-30-(28-30)). However, when O'Donnell turned over his file to the government pursuant to a subpoena, the file of Rendina contained only one document. That document was an NCIC which was provided by Government counsel to O'Donnell. (R-2-30-(46 and 68)). There were no certified copies of convictions present. Further, there were no notes of any conversations with Rendina or Roussonicolos. (R-2-30-46).

2. O'Donnell claims that he interviewed Rendina regarding Rendina's involvement in the entrapment of the Defendant. No notes were taken of this interview and no one else was present. (R-2-30-(46 - 56)). During his testimony, O'Donnell admitted that the interview of Rendina dealt with little or no facts with Rendina saying solely that if he were called he would bury the Defendant. (R-3-26-43) and (R-2-30-47). O'Donnell never elicited from Rendina just how Rendina would bury the Defendant.

Cacciatore indicated that O'Donnell never told him the facts which would demonstrate why Rendina would bury the Defendant. (R-2-30-82). Further, Cacciatore, Petitioner's investigator, was not present during any conversations between Rendina and O'Donnell. (R-2-30-82). Rendina testified that he never told O'Donnell any details, merely that his testimony would not be helpful to the Defendant. (R-3-26-43).

O'Donnell obviously did not fully investigate the testimony of Rendina. The failure of O'Donnell to investigate the testimony of Rendina is a major breach of the duty of loyalty which O'Donnell owed the Petitioner. By not ascertaining what Rendina's actual testimony would be, O'Donnell effectively allowed his close personal friend, Rendina, who had a significant stake in the outcome of Petitioner's trial, (loss of mitigation pursuant to Rule 35 and loss of U. S. Currency from Collazo for participating in the "Reverse Sting" for which Rendina ultimately received $7,500.00) to decide whether he, Rendina, should be called as a witness. This flagrant breach of O'Donnell's loyalty to the Petitioner had a serious impact on the Petitioner's trial. Ultimately, Rendina was not called as a witness by either the government or the defense. Petitioner has shown that Rendina was not called as a witness by O'Donnell because of the very close friendship between O'Donnell and Rendina. If called as a witness, Rendina could have been subject to criminal prosecution by the United States Government for his involvement in this case. Further, any hopes that Rendina had to mitigate his sentence in the tax evasion case and any possible financial renumerations would have evaporated had he been called and testified truthfully in this case.

3. A. Rendina, having testified at the evidentiary hearing, caused several pieces of testimony and evidence to come to light which are favorable to the Petitioner and which were not brought forth in Petitioner's trial due to Rendina not being called as a witness. Rendina testified that he had conversations with the Petitioner regarding the Petitioner's desire and ability to invest in a gaming operation Rendina was involved with in the country of Panama. (R-3-26-43). O'Donnell was aware, prior to Petitioner's trial, that Rendina was in fact trying to organize a gaming operation in the country of Panama. (R-2-30-49). That information could not be fully explored at trial without Rendina's testifying.

B. Rendina also testified that he was made aware of the Lombardos through Roussonicolos. (R-3-26-44).

Rendina expressed the view that he felt that Roussonicolos was involved in something that Roussonicolos, should not be involved in. (R-3-26-47). Because of the loyalty which Rendina felt towards Roussonicolos, Rendina felt an obligation to intervene with the Lombardos to make sure that no negative consequences fell upon Roussonicolos. (R-3-26-46). Neither Rendina's deep loyalty nor his reason for this loyalty to Roussonicolos was ever brought out to the jury. Further, the reason for Rendina becoming involved in this case was never brought out to the jury. Roussonicolos encouraged and conjoled the Petitioner into locating someone who was capable of purchasing large quantities of cocaine. Once Roussonicolos had convinced the Petitioner to do this, he had to find someone who could provide the drugs. Hence, Roussonicolos brought Rendina into the fray in hopes that Rendina knew someone who could supply the cocaine. Either Rendina or Collazzo, a person that Rendina knew as a DEA informant and drug dealer, realized that they could benefit from the situation with no adverse consequences whatsoever, if law enforcement were brought in as the supplier of the cocaine. No one would have to worry about going to prison, Collazzo would get paid handsomely, and Rendina could possibly receive mitigation of his sentence and recoup some of the money he invested with Collazzo in the Panama casino deal.

C. Another reason for Rendina's involvement in this case, which was never mentioned to the jury was the investment that Rendina had made with Collazzo in the Panama casino deal. Rendina testified that he was aware that an informant participating in a reverse sting could receive up to 25% of the monies seized. (R-3-26-(46 and58)). Rendina testified that he saw this as a way to recoup some of the money which he had invested with

Collazzo. (R-3-26-58). In fact, Rendina was paid $7,500.00 by Collazzo immediately after Collazzo received his money from the United States Government. (R-3-26-78).

D. Additionally, Rendina testified that an original motive of participating in this case was the mitigation of his sentence in the tax evasion case. (R-3-26-(46 and 59)). Rendina testified that prior to his cooperation in this case, he had served a few weeks of an 8 months prison sentence. (R-3-26-(59-60)). The fact that Rendina still had a substantial portion of his sentence to serve was never brought to the jury's attention because Rendina did not testify.

E. Rendina's testimony at the evidentiary hearing made it clear that after meeting with the DEA at the airport restaurant, Rendina went and met with the LOMBARDO'S at the request of the DEA. (R-3-26-52). The fact that Rendina had at least one meeting with the Petitioner after meeting with law enforcement was not brought out at trial. Rendina testified that at the meeting between himself, Roussonicolos, and the LOMBARDOS that he could not remember how the subject of cocaine came up. (R-3-26-48). He stated that he thought Roussonicolos brought up the subject of cocaine. (R-3-26-49). Rendina stated that the sole purpose of meeting with the LOMBARDOS after speaking with DEA was to introduce Collazzo to the Defendants, (R-3-26-49), yet according to Rendina, Collazzo was not present at the meeting. If the purpose of the meeting was to introduce Collazzo to the Lombardos, why was Collazzo not present, or was he? These facts were never brought out at trial because Rendina did not testify.

F. Further, the DEA did not attempt to surveil the

above mentioned meeting(s) with the Petitioner. (R-3-26-51). The DEA did not ask Rendina or Roussonicolos to wear a wire during the meeting(s). (R-3-26-(49 and 53)). These facts were not brought out at the Defendant's trial.

G. Rendina, during his testimony, mentioned that the DEA, at the airport restaurant meeting, brought up and discussed the issue of entrapment. (R-3-26-81). This was certainly not brought out at the Petitioner's trial.

H. When reviewing the transcript between the Petitioner and Collazzo dated July 23, 1996, it is evident that Collazzo knew the Petitioner and the Petitioner knew Collazzo prior to the meeting. If one examines the transcript there is no introductions. There was no comment as to "I am the person that Rendina said would come" or any other type of introduction. (R-3-26-105) and (R-4-28-28). This leads a rational and logical mind to believe that Collazzo had been introduced to the Petitioner prior to July 23, 1996. If this occurred, then there were meeting(s) involving Collazzo and Rendina which were not surveiled by law enforcement. This information and theory was never presented to the jury for their consideration.

I. The fact of prior unsurveiled meeting(s) between Collazzo and the Petitioner is buttressed by the fact that a 3 to 4week period lapsed between when Collazzo first contacted the DEA about this case and the airport restaurant meeting. (R-3-26-(90 and 91)). This is another fact which was not presented to the jury because Rendina was not subpoenaed to testify.

4. It is note worthy that O'Donnell at the bond hearing before the Honorable Judge Vitunac stated that, "We will also have to deal with Mr. Collazzo's testimony. I

am quite certain that he will attempt to fill in the gaps. I'll tell the court that Mr. Gaetano Lombardo's defense is an entrapment defense. I indicated in my motion that there were conversation(s_) that he had with Rendina and Peter Roussonicolos before he ever met with Collazzo that had nothing to do with drugs, that lead to the meeting with Collazzo". (Transcript of Hearing on motion to Reduce Bond before the Honorable Ann E. Vitunac, page 21). How was O'Donnell going to build the entrapment defense without introducing evidence of these prior meetings or the conversations held at the prior meetings. As a learned defense counsel, O'Donnell should have known that the defense of entrapment had to be built upon statements of Rendina and Roussonicolos from the prior meetings. In fact, the Petitioner had stated all along that Rendina and Roussonicolos had on several occasions used the lure of participating in the Panama gaming venture to get the Petitioner to introduce them to someone who could buy large amounts of cocaine. (R-3-26-13). O'Donnell's failure to call Rendina as a witness was designed to protect his good friend, Rendina and was to the detriment of the Petitioner.

5. At the bond hearing, O'Donnell stated that he had no intention of calling Rendina as a witness. (R-2-30-23) and (Transcript of Hearing on Motion to Reduce Bond before the Honorable Ann Vitunac, pages 37-38). However, at the hearing on the current motion, he indicated that he did everything he could to get the government to call Rendina as a witness. (R-2-30-22). When questioned, O'Donnell admitted that he was aware that he could have called Rendina as an adverse witness and cross examine Rendina. (R-2-30-56). This testimony is inconsistent at best, if not an outright lie.

6. As a result of Rendina not testifying and Judge Gonzalez

refusing to give an entrapment instruction based solely upon the cross examination of Collazzo, the Defendant was forced to testify. (R-2-30-(27 and 28)). Both the Petitioner and O'Donnell testified that the Petitioner did not want to testify. (R-1-21-(25, 27 and 28)). Because there was no plan to call the Petitioner to testify, O'Donnell had spent little time in preparing Petitioner to testify. The Petitioner indicated that the only preparation he received prior to testifying was during the breaks taken in the trial. (R-2-30-(25 and 26)). Petitioner estimated that no more than one or two hours were spent preparing him to testify. (R-3-26-87). O'Donnell indicated that several hours, maybe as many as 12, were spent in preparing the Petitioner to testify. (R-2-30-28). O'Donnell has every incentive to misstate or exaggerate the number of hours spent with the Petitioner in preparation of testifying. Obviously, it is ineffective assistance of counsel for a defense attorney to place any witness, let alone a Defendant, on the stand without sufficient preparation. This doesn't even take into consideration the fact that the Petitioner received a 5th grade education in Italy, had no formal schooling at all in the United States, spoke Italian as his primary language and had only a fair working grasp of the English language. (R-3-26-82).

7. Because O'Donnell instructed Cacciatore not to investigate Rendina and because Rendina was not called to testify, the jury was not informed that Rendina had in fact disobeyed the order of a Federal District Judge by leaving the United States without the court's permission. (Hearing re: Government's Motion for Rule 35, United States v. Rendina 7/18/00, pgs. 3-4 and 6); and that Rendina had bribed an Assistant State Attorney in Broward County, Florida. (Hearing re: Government's Motion for Rule 35, United States v. Rendina 7/18/00, pgs. 7-8) This is all information that O'Donnell should

have had and would have had if he had allowed Cacciatore to investigate Rendina and called Rendina as a witness.

The only defense which the Defendant had was one of entrapment. This defense was gutted by O'Donnell's refusal to allow his best friend and client, Rendina, to be investigated and called as a witness at trial.

The above demonstrates that O'Donnell had an actual conflict of interest in representing the Petitioner because the Petitioner suffered severe adverse consequences because of O'Donnell's divided loyalties. For their to be an actual conflict of interest, the Petitioner must have suffered an adverse consequence, because if there was no adverse consequence, the conflict of interest is hypothetical as opposed to actual. Mickens.

Adverse effect has been described as the availability of a plausable alternative strategy which the attorney could have pursued, with said alternative strategy being reasonable, but said alternative strategy was not pursued because it conflicted with the Defense Counsel's external loyalties. Fruend v. Butterworth, 165 F.3d 839 (11th Cir. 1999) and Reynolds v. Chapman, 253 F. 3d 1337 (11th Cir. 2001). Although not directly on point, negotiation of a plea for one client that involves testifying against another, results in an actual conflict of interest. Burden v. Zant, 24 F.3d 1298 (11th Cir. 1994) and Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985). Although O'Donnell did not negotiate a plea on behalf of Rendina to testify against the Petitioner, the circumstances are very similar. O'Donnell kept Rendina from testifying in hopes Rendina would receive a reduction in Rendina's sentence in the tax evasion case. Magistrate Judge Vitunac found that the calling of Rendina to testify was a reasonable alternative trial strategy. (R-1-42-14). Her belief is buttressed by the evidence which was not presented to the jury because Rendina did not testify.

O'Donnell's refusal to call Rendina as a witness may also have resulted from the way the Petitioner's trial proceeded. The Petitioner

was indicted, along with Franco Lombardo, and Roger DiCaire. Roger DiCaire was injured and his trial was severed from that of the Petitioner and Franco Lombardo. (Transcript of Hearing on Motion to Reduce Bond before the Honorable Ann Vitunac, page 8). During the trial of the Petitioner and Franco Lombardo, a mistrial was granted as to Franco Lombardo. Once Franco Lombardo was mistried from the case, the only counsel then available to cross examine Rendina was O'Donnell. O'Donnell deflected the inherent conflict which would have occurred if he had been forced to cross examine Rendina by not calling Rendina as a witness. Lightbourne v. Dugger, 829 F2d 1012 (11th Cir. 1987) (An attorney who cross-examines a former client inherently encounters divided loyalties.) Wheat v. U. S., 486 U.S. 153 (1988) (Conflicts of interest may prevent an attorney from challenging the admission of evidence prejudicial to one client but favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of one client in order to minimize the culpability of the other.) Fitzpatrick v. McCormick 869 F2d 1247 (9th Cir. 1989), (Among the dangers of successive representations is that the attorney, who has obtained privileged information from a former client, may fail to conduct a rigorous cross-examination.) In the Petitioner's case, O'Donnell failed to conduct any cross-examination at all.

CONCLUSION

For the foregoing reasons, the Petitioner, GAETANO LOMBARDO, respectfully requests that this Honorable Court reverse the District Court's Order which denied relief under 28 U.S.C. § 2255. The Petitioner has proved by a preponderance of the evidence that his Trial Defense Counsel, John O'Donnell, labored under an actual conflict of interest while representing the Petitioner due to his close personal friendship with Richard Rendina and representation of Richard Rendina, the person who entrapped Petitioner. The actual conflict of interest was shown by proving that John O'Donnell simultaneously represented the Petitioner and Richard Rendina, as well as the close personal relationship which existed between Richard Rendina and John O'Donnell. The conflict of interest was also proven by demonstrating the adverse effect O'Donnell and Rendina's relationship had on the representation O'Donnell provided Petitioner, including decisions regarding trial strategy and preparation.

The adverse effect was the failure to call and cross examine Richard Rendina. Had he been called as a witness additional information explaining the theory of defense (entrapment) would have been presented.

The Petitioner's Conviction and Sentence should be vacated and set aside.

Respectfully submitted,

David F. Pleasanton

David F. Pleasanton, Esquire

APPENDIX

Magistrate Vitunac's Report and Recommendation A-1

Judge Gonzalez's Order A-2

Decision of 11th Circuit Court of Appeals A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-8195-Civ-Gonzalez/Vitunac
96-8090-Cr-Gonzalez

GAETANO LOMBARDO,

Movant,

Filed Aug. 31, 2001

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on an Order of Referral (Civ.DE 3) from United States District Judge Jose A. Gonzalez, Jr., filed March 9, 2000, and a subsequent Order of Reassignment (Civ. DE 12) filed August 16, 2000. Before the Court is Movant's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 (Civ DE 1) ("§ 2255 Motion") filed March 6, 2000. For the reasons stated below, it is hereby RECOMMENDED that Movant's § 2255 Motion be GRANTED.

I. BACKGROUND

A. Procedural Background

1. Trial Proceedings

On September 12, 1996, Movant was charged by criminal complaint (Cr DE 2) and was subsequently indicted (Cr DE 19) on September 19, 1996, with two counts: Knowingly and intentionally conspiring t possess with intent to distribute cocaine in violation of and attempting to possess with intent to distribute cocaine in violation of 21 U. S.C. §§ 841(a)(1) and 846.

On September 16, 1996, Attorney Fred Haddad temporarily represented Movant at his bond hearing. (T1.15; Bond Hearing minutes (Cr De 13).) After the bond hearing, Movant was represented by Attorney Jack Goldberger who filed a notice of appearance on behalf of Movant on Oct9ber 7, 1996. (T1.20; Notice of Filing of Permanent Appearance (Cr DE 38).) On February 27, 1997, Attorney Goldberger withdraw and Attorney Jack O'Donnell began representing Movant. (T1.6; Order on Stipulation of Substitution of C9ounsel (Cr. DE 68).)

On December 121, 1997, Movant's jury trial began. (Court minutes (Cr de 22).) On December 17, 1997, the jury entered verdicts of guilt as to each count. (Jury Verdict (Cr DE 136).) On may 22, 1998, Movant was sentenced to 188 months imprisonment followed by 5 years of supervised release and a 41000 fine. (Sentencing Hearing minutes (Cr DE 178); Judgement of Conviction (Cr DE 180).) Attorney O'Donnell represented Movant throughout the trial (T1.14.) 2. Direct Appeal

On May 29, 1998, Movant's current attorney, David Pleasanton, filed a notice of appearance on Movant's behalf and filed a notice of appeal. (Notice of Appearance for Purpose of Appeal (cr. DE 179); Notice of Appeal (Cr DE 181).) On September 30, 1999, the United States Court of Appeals for the Eleventh Circuit affirmed Movant's conviction and sentence. On November 17, 1999, mandate issued.

3. § 2255 Motion

On March 3, 2000, Movant filed the pending § 2255 Motion. In the § 2255 Motion, Movant makes three arguments. First, Movant first claims that he was denied effective assistance of counsel due to a conflict of interest between Movant and trial counsel's closest personal friend, Richard Rendina. Second, Movant also alleges that trial counsel was ineffective because he failed to reduce to writing an oral agreement with the Government. Finally, Movant argues ineffective assistance of counsel claim relying based on a subsequent United States Supreme Court decision based on trial counsel's failure to argue that his sentence was improperly enhanced based on uncharged conduct.

On October 2, 2000, this Court began an evidentiary hearing in this matter.[1] First, Jack O'Donnell , Movant's trial attorney, testified. (T1.5-69). Next, Ronald Cacciatore, a private investigator hired to assist O'Donnell in Movant's defense, testified. (T1.78-86). Movant's brother, Anthony Lombardo, testified. (T1.86-100). Finally, Movant began to testify. (T1. 100-113).

On October 3, 2000, this Court continued the evidentiary hearing. Movant continued to testify. (T2.4-38, 82-88.) Next, Richard Rendina testified. (T2. 39-81). Thereafter,

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[1]The transcripts of the evidentiary hearing in this matter are abbreviated as follows: Transcript of Hearing held on October 2, 2000 (Civ DE 30) ("T1"); Transcript dated Transcript of Hearing held on October 3, 2000 (Civ. DE 26) ("T2"); Transcript of Hearing held on October 20, 2000 (Civ DE 28) ("T3"); Transcript of Hearing held on November 28, 2000 (Civ DE __) ("T4").

Drug Enforcement administration ("DEA") Special Agent Louis Perez testified. (T2. 89-111).)

On October 20, 2000, this Court continued the evidentiary hearing. DEA Special Agent Brett Scott, (T2 6-45), and Assistant United States Attorney Diana Fernandez, (T2. 45-82). On November 28, 2000, this Court concluded the evidentiary hearing. Assistant Unites States Attorney Scott Behnke testified. The parties were thereafter afforded an opportunity to submit post-hearing briefs.

B. Factual Background

Sometime in June, 1996, a confidential informant named Roberto Collazo made contacted DEA Special Agent Luis Perez in the parking lot of his office building regarding a potential cocaine transaction. (T2. 90) In mid-July, 1995, Collazo set up a meeting to be attended by Peter Roussonicolos, Richard Rendina, DEA Special Agents Brett Scott and Luis Perez, and himself, at the Fort Lauderdale Airport. [2] (T2. 50, 52, 90-91; T3 9-10.) This was the only meeting Richard Rendina had with the DEA. (T2 51, 91). Rendina understood that the DEA would let the Unites States Attorney's Office know about Rendina's cooperation in the Movant's case if the reverse sting came to fruition. (T2 73, 100).

Sometime after the meeting at the airport, Roussonicolos introduced Collazo to Movant and his brother as an individual who had an associate, Collazo, who could provide cocaine to

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[2]Special Agent Perez testified that a DEA 6 was not prepared, no notes were taken, and that the United States Attorney's Office was not contacted as a result of this meeting. (T2 94).

the Movant and his brother. (T2. 47-48, 104; T3 27.) Rendina also testified that Roussonicolos first brought up the discussion of the cocaine transaction. (T2 49.) Rendina also testified that neither Movant nor his brother expressed any hesitation when the cocaine transaction was discussed. (T2. 49, 72.) This was Rendina's only meeting with the Movant and his brother. (T2 47.)

On July 22, 1996, Special Agents Perez and Scott brought Collazo into the DEA office for a meeting for a formal debriefing. (T2 96). On July 23, 1996, Collazo was fitted with an electronic listening device and met with the Movant and his brother. (T2 97, 104.)

1. Relationship of O'Donnell and Roussonicolos

Attorney O'Donnell testified that he knew a person named Peter Roussonicolos because an individual that shared space with attorney O'Donnell, Richard Rendina, had represented Roussonicolos in a variety of criminal matters during the mid 1980's. (T2. 11-12.) Attorney O'Donnell testified that he never formally represented Roussonicolos but that Roussonicolos had consulted with him over some sentencing-related paperwork in a matter where Roussonicolos had been represented by Attorney Alvin Entin. (T1. 12.) Attorney O'Donnell also testified that he had not engaged in an recreational activities with Roussonicolos. (T1. 12-13.)

2. Relationship of O'Donnell and Rendina

Attorney O'Donnell testified that he met Richard Rendina ("Rendina") in 1980 or 1981 when Rendina was a

Broward County State Attorney.[3] (T1. 14.) In 1982 or 1983, Rendina subleased office space from attorney O'Donnell. (T1. 14.) Attorney O'Donnell testified that he had referred cases to Rendina and that Rendina had referred cases to him. (T1. 14-15.)

Attorney O'Donnell testified that he and Rendina have been good friends for 20 years. (T1. 16.) Attorney O'Donnell's and Rendina's "families are friends and socialize together." (T1. 16.) Attorney O'Donnell testified that Rendina and he have played golf together and have taken vacations together. (T1. 16; T2 42.) Attorney O'Donnell stated that he was "more or less [part of Rendina's] extended family." (T1. 16.) Attorney O'Donnell also stated that he had employed Rendina to perform some paralegal duties in United States v. Kenneth Gayron[4] (T1. 17.) These paralegal duties were performed sometime before 1997 (T2. 40-41.)

Attorney O'Donnell testified that at the time he began representing Movant, he was aware of the Government's case against Rendina in United States v. Richard Rendina, Case No. 94-6170-Cr-Hurley, pending before District Judge Daniel T. K. Hurley ("Rendina Proceedings"). (T1. 15-16, 21.) In the Rending Proceedings, Rendina plead guilty to making a false

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[3]Rendina was disbarred in 1991. (T.40.)

[4]The clerk's docket shows that Attorney O'Donnell represented Kenneth Gayron in Untied States v. Kenneth Gayron, Case No. 96-6141-CR-Hurley. In that proceeding Attorney O'Donnell represented Gayron at the intial hearing on August 30, 1996. A judgement of conviction was entered against Gayron on August 24, 1999, by District Judge William P. Dimitrouleas.

statement on his 1986 income tax return. (T2 39.) The first attorney of record representing Rendina was Paul David Lazarus who filed a Notice of Appearance (Cr DE 7) on October 7, 1994. On May 25, 1995, Attorney Ian Seitel filed a Notice of Appearance (Cr. DE 25) On May 25, 1995, Attorney John Tierney filed a Notice of Limited Appearance (Cr DE 37). Ian Seitel was Rendina's attorney of record during the Rule 35 proceedings.

Attorney O'Donnell testified that he had informally rendered legal advice to Rendina regarding certain problems including the Rendina Proceedings. (T1. 16, 21-22.) In addition, Attorney O'Donnell testified that he had filed motions on behalf of Rendina which were as follows: Motion for Permission to Travel (See United States v. Richard Rendina, Case No. 94-6170-Cr-Hurley at DE 80) on February 5, 1998; Defendant's Unopposed Motion to Travel (Id. At DE 82) On April 23, 1998; and Defendant's Unopposed Motion to Terminate Supervised Release (Id. At DE 83) on April 23, 1998. (T1. 15, 30-32). However, the clerk's docket does not show the filing of a notice of appearance by Attorney O'Donnell, and Attorney O'Donnell testified that he never formally appeared on behalf of Rendina. (T1. 43.) Rendina also testified that he never formally retained Attorney O'Donnell. (T2 41.)

In Defendant's Unopposed Motion to Terminate Supervised Release (Rendina Proceeding DE 83), Attorney O'Donnell argued that Rendina's supervised release should be terminated because, inter alias, Rendina had cooperated with the United States Attorney's Office in United States v. Franco Lombardo, Case No. 96-8090-Cr-Gonzalez. Attorney O'Donnell also admitted that he had argued Rendina's involvement in Movant's case as a mitigating factor in Rendina's proceeding. (T1. 32.)

Attorney O'Donnell testified that during the representation of Movant he had told Movant that he "had known [Rendina] a long time and [Rendina] was a good personal friend of mine." (T1. 24.)

3. Lombardo Proceedings

Attorney O'Donnell stated that because the Government had audiotapes of Movant incriminating himself, one of the only viable defenses was entrapment. (T1. 20.) Attorney O'Donnell employed the defense of entrapment at trial. (T1. 21.) Attorney O'Donnell stated that the defense contended that the Government's informant, Roberto Collazo, "with the help of Rendina" had entrapped Movant. (T1. 21.)

Attorney O'Donnell testified that during the trial he was not sure whether the Government would or would not call Rendina to testify despite the Government's assertion that it would not do so. (T1. 22.) Attorney O'Donnell testified that he "dd everything that he could to cause the Government to call Rendina." (T1.22). Attorney O'Donnell testified that there would be "a lot of material out there to cross-examine Rich Rendina on" which included prior convictions and that fact that Rendina was on supervised release and that Rendina was getting a benefit for his testimony. (T1. 232.) Attorney O'Donnell admitted that he would have been required to "trash his best friend." (T1. 23.) However, the Government never called Rendina. (T1. 24, 51.)

Attorney O'Donnell testified that he had intended to call Rendina as a witness on behalf of Movant until he spoke with Rendina. (T1. 23.) Attorney O'Donnell testified that he spoke with Rendina couple of times regarding the Movant's case. (T1.46.) However, Attorney O'Donnell did not take any notes of such interviews, and no other party was present during these

interviews, not even Ron Cacciatore, Movant's private investigator. (T1. 45-46, 56.) Attorney O'Donnell testified that his interviews revealed that if Rendina testified, he would not support Movant's entrapment defense. (T1. 47.) Rendina also testified that he had gold Attorney O'Donnell that his testimony would not be helpful to Movant. (T2. 43.)

According to Attorney O'Donnell, he also spoke with Pete Roussonicolos over the telephone regarding the Movant's case. (T1. 49-50.) However, Attorney O'Donnell concluded that Roussonicolos' testimony would not be helpful in the entrapment defense. (T1. 50.)

During the § 2255 evidentiary hearing, Rendina testified about his role in the Lombardo case. (T2 44.) Rendina stated that he knew Pete Roussonicolos. (T2 44, 93.) Rendina stated that he had represented Roussonicolos over a twelve year period regarding certain alleged criminal matters. (T2. 44.) In addition, Roussosnicolos had referred defendants to Rendina. (T. 44.) Rendina stated that Roussonicolos approached him with information regarding a possible cocaine transaction involving Movant and an investment in a gaming opportunity in Panama involving the Lombardos. (T2. 44.) Rendina testified that he suggested that he would introduce Roussonicolos to Roberto Collazo, a government informant that Rendina had met and had entered into a Panamanian business venture. (T. 45-46.) Rendina testified that he was motivated to introduce Roussonicolos to Collazo because he felt a loyalty to Roussonicolos; because he sought monetary gain knowing that Collazo was a paid informant; and because he hoped that Judge Hurley would consider his participating as a mitigating factor in the Rendina Proceedings. (T2. 46.)

4. Movant's 5K1 Reduction

Attorney O'Donnell testified that at or prior to sentencing of Movant, he filed a motion to enforce a verbal agreement with the Government. (T1. 7.) In that motion, Movant claimed that he and Assistant United States Attorney Diana Fernandez agreed over the telephone that if Movant convinced his cousin, Franco Lombardo, to plead guilty, that Movant would get a 5K1 reduction. (T1. 7.) Attorney O'Donnell testified that he informed Movant about the phone conversation. (T1. 7.) Thereafter, Attorney O'Donnell and Movant had a number of meetings with Franco Lombardo and his counsel, Jim Eisenberg. (T1. 8.) Subsequently, Franco Lombardo plead guilty. (T1.8.) Attorney O'Donnell testified that he sought the 5K1 reduction as allegedly agreed to by the Government, but Assistant United States Attorney Diana Fernandez denied such an agreement. (T1. 9.)

On May 15, 1998, Attorney O'Donnell filed a Motion for Specific Performance of Oral Substantial Assistance Agreement with Government (Cr DE 170). At Movant's evidentiary hearing on the Motion for Specific Performance, both Attorney O'Donnell and Assistant United States Attorney Fernandez testified (T1. 51-52.) District Judge Gonzalez denied the motion finding that no such agreement had been entered into by the parties. (Tr. Of 5/15/98 Hearing 86-88 (Cr DE 195); T1. 10; Minutes of Evidentiary Hearing (Cr DE 174).)

II. DISCUSSION

A. Ineffective Assistant of Counsel - Conflict of Interest

Movant first claims that he was denied effective assistance of counsel due to a conflict of interest between Movant and trial counsel's close personal friend, Richard

Rendina. Movant. In order to establish an ineffective assistance of counsel claim arising from an alleged conflict of interest, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. See, Cuyler v. Sullivan, 446 U. S. 335, 347, 100 S.Ct. 1708, 1717 (1980); Buenoano v. Singletary, 74 F.3d 1078, 1086 (11th Cir. 1996); Freund v. Butterworth, 165 F3d 839, 858 (11th Cir. 1999). Thus, in a conflict of interest case, the Court must first determine whether an actual conflict existed, and then determine whether the actual conflict had an adverse effect on counsel's representation. See Buenoano, 74 F.3d at 1086. A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Cuyler, 446 U. S. at 348.

1. Actual Conflict

During Movant's criminal proceedings it is undisputed that Attorney Jack O'Donnell was a very close friend of Richard Rendina. During a bond reduction hearing during the trial proceedings, the undersigned magistrate judge was informed by the Government and Movant's trial counsel, Attorney O'Donnell, that Attorney O'Donnell had "long-standing personal relationship with Richard Rendina and that at the time that O'Donnell began representing [Movant], Rendina had worked on some legal matters for O'Donnell. (Cr. DE 101.) This court then inquired whether Attorney O'Donnell should be representing Movant because Rendina could be called as a witness. The Government and Attorney O'Donnell represented to this Court that the district court had been informed of this issue three months earlier during a calendar call. However, the parties agree that there is no record or transcript of what was discussed during the calendar call. Furthermore, it is undisputed that Movant was not present at the calendar call. No Garcia hearing was held in this matter.

Movant's trial counsel, Jack O'Donnell, was a close personal friend of Richard Rendina for around 20 years.[9] In fact, Attorney O'Donnell and Rendina had a strong social relationship and Attorney O'Donnell considered himself to be a member of Rendina's extended family. Attorney O'Donnell advised O'Donnell on an informal basis over the years. In addition to sharing office space, Rendina was also employed by Attorney O'Donnell after Rendina was disbarred. Although Attorney O'Donnell continued to represent Movant in the Spring of 1998, Attorney O'Donnell signed and filed pleadings in the Rendina Proceedings in February and April, 1998.

Richard Rendina played a material role in the events leading to Movant's conviction by aiding in the introduction of the government informant Roberto Collazo to the Movant and his brother. It is also uncontested that the Movant's defense to the charges was that he was entrapped by the Government. It is also uncontested that Rendina benefitted by Movant's prosecution in the form of a Rule 35 Motion in which Rendina's participation in the Government's case against Movant and his brother was argued as a mitigating circumstance. Additionally, although Attorney O'Donnell never filed a notice of appearance in the Rendina proceedings, it is undisputed that Attorney O'Donnell filed pleadings on Rendina's behalf. In one pleading, Rendina's Unopposed Motion to Terminate Supervised Release (Rending Proceeding DE 83), Attorney O'Donnell even argued that Rendina's supervised release should be terminated because, inter alia, Rendina had cooperated with the United States Attorney's Office in Movant's case: Untied States v. Franco Lombardo, Case No. 96-8090-Cr-Gonzalez. Finally, it is undisputed that Attorney O'Donnell and Rendina were very close friends and that Attorney O'Donnell considered Rendina "extended family" during the time that Attorney O'Donnell represented Movant. This Court finds that under the totality of these circumstances, Attorney O'Donnell had an actual conflict

of interest due to his close, personal relationship with Richard Rendina who had a personal stake and participated in the arrest and prosecution of Movant. See Freund v Butterworth, 165 F.3d 839 (11th Cir. 1999) (An "actual conflict" of interest occurs when a lawyer had "inconsistent interests" with his client.).

2. Adverse Effect

Even if an actual conflict of interest exists, there must be proof that the conflict adversely affected counsel's performance in order to rise to the level of a Sixth Amendment violation. See Buenoano, 74 F.3d at 1086 ("In assessing whether an actual conflict adversely affected counsel's representation, "[a] petitioner need not show that the result of the trial would have been different without the conflict of interest, only that the conflict had some adverse effect on counsel's performance." (quoting McConico, 919 Fc. 2d 1548). To prove adverse effect, a habeas corpus petitioner must show: (1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense. See Freund, 165 F.3d at ___ (holding that a petitioner must establish that the alternative defense strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

In the case at hand, plausible alternative defense strategy or tactic that might have been pursued by Attorney O'Donnell by calling Richard Rendina as witness. Attorney O'Donnell stated that had Rendina been called as witness, Attorney O'Donnell could have vigorously cross-examined Rendina because O'Donnell was privy to Rendina's nefarious history. Furthermore, such alternative strategy or tactic was reasonable under the facts since Movant's defense was entrapment and

Rendina played a role in introducing the government informant to Movant. Rendina undisputedly had an interested in facilitating an illegal transaction involving Movant to benefit himself in his own criminal matter. Finally, there is a link between the actual conflict and the decision to forgo the alternative strategy of defense. If O'Donnell called Rendina as a witness, the Government's cooperation in Rendina's criminal proceedings could have been jeopardized had Rendina's testimony been adverse to the government's case against Movant. An inadequate performance by Rendina could have adversely effected the Government's case against Movant. Accordingly, had Attorney O'Donnell called his friend, Rendina, the Government's assistance to Rendina could have been adversely impacted.

In sum, this Court has considered these circumstances and finds that Movant's counsel labored under an actual conflict of interest which adversely affected the performance of Movant's trial counsel. Accordingly, Movant's conviction should have been vacated and a new trial should be ordered.[5]

B. Ineffective Assistance of Counsel - Sentencing

Movant also alleges that Attorney O'Donnell was ineffective because he failed to reduce to writing an alleged

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[5]It is apparent from reviewing the record in this instant case that the Government was aware of the relationship between O'Donnell and Rendina and was aware that Rendina was a potential witness. Under these circumstances the Government should have proceeded to move for a Garcia hearing. Has a Garcia hearing been held, the conflict of interest issue presented in this 2255 Motion could have been properly addressed by the district judge prior to trial.

agreement with the Government regarding a promise the Government made to file a motion pursuant to the Federal Sentencing Guidelines §5K1 if Movant was able to convince his co-defendant, Franco Lombardo, to plead guilty. On May 15, 1998, prior to sentencing, Movant filed a Motion for Specific Performance of Oral Substantial Assistance Agreement with the Government (Cr DE 170). However, the trial judge held an evidentiary hearing and found no such agreement had been entered into by the parties. (Tr. Of 5/15/98 Hearing 86-88 (Cr. DE 195).)

Ineffective assistance of counsel claims are reviewed under the two-prong analysis set forth in Strickland v. Washington, 466 U.S. 668 (1984). Specifically, Movant must show that counsel's performance was deficient and that also show that, but for counsel's deficient performance, the outcome would have been different. See id. At 687.

Since the trial judge found that the parties had not entered into any agreement, Movant cannot show that trial counsel's failure to reduce to writing a non-existent agreement resulted from counsel's deficient performance. Accordingly, this argument is without merit.

C. Apprendi

Movant argues ineffective assistance of counsel claim based on trial counsel's failure to argue that his sentence was improperly enhanced based on uncharged conduct. More specifically, Movant claims that his sentence was improperly enhanced by determining that the amount of cocaine involved exceeded 50 kilograms cocaine even though the indictment did not set forth any specific quantity of cocaine and Movant was never found guilty regarding such quantity. In support of this contention, Movant points to the Supreme Court case, Apprendi

v. New Jersey, 530 U.S. 466, 120 S. ct. 2348 (2000). It is undisputed that Movant's conviction became final before Apprendi was decided. Accordingly, the issue in this matter is whether the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), decided on June 26, 2000 may serve as the basis for collateral attack of a conviction that became final before Apprendi was decided. This issue has not been addressed by the Eleventh Circuit Court of Appeals. However, this Court recently considered this issue in Mc Donald v. United States, Case No. 01-8014-Civ.-Ryskamp/Vitunac. In McDonald, this Court recommended that the Movant's § 2255 Motion be dismissed as a matter of law because this Court found that the Movant could not collaterally attack his conviction and sentence based on the retroactive application of Apprendi. See McDonald v. United States, Case No. 01-8014-Civ-Ryskamp/Vitunac (Report and Recommendation entered on 1/9/01); see also United States v. Zapata-Rodriguez, 2001 WL 194758 (N.D. Tex. Feb. 22, 2001); United States v. McCloud, 2001 WL 173776 (D. Kan. Feb. 16, 2001). In McDonald, the Report and Recommendation[6] of this Court stated in relevant part as follows:

> Movant argues in his § 2255 Motion that based on the United States Supreme Court decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), which was decided on June

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[6]On February 22, 2001, the District Court entered an Orde which "ratified, affirmed and approved" this Court's Report and Recommendation. See id. (Order Adopting Report and Recommendation entered on 2/22/01). On March 6, 2001, the District Court entered an Order Granting Certificate of Appealability to the Eleventh Circuit.

26, 2000 ... supports the reversal of Movant's sentence ...

Since Apprendi was decided after Movant's conviction became final, the issue in this matter is whether Apprendi may be retroactively applied on initial collateral review [footnote omitted]. The determination of whether a rule of law will be applied to cases on collateral review is set forth in Teague v. Lane, 489 U.S. 288 (1989)/ See Nutter v. White, 39 F.3d 1154, 1156 (11th Cir. 1994). In Teague, the Supreme Court held that a new constitutional rule of procedure established after a petitioner's conviction becomes final may not be applied on habeas corpus review unless it meets one of two narrow exceptions. See id. (Citing Teague, 489 U.S. at 311-313). The first exception permits retroactive application of new rules that place "certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. (Quoting Teague, 489 U.S. at 307). The second exception allows retroactive application of new rules that involve procedures that are "implicit tin the concept of ordered liberty." Id. (Quoting Teague, 489 U.S. at 307).

Under Teague, a case announces a new rule "when it breaks new ground or imposes a new obligation of the States or Federal Government [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U. S. at 301. This Court finds that Apprendi announced a new rule

by requiring any fact that increases the penalty for a crime beyond the prescribed statutory maximum to be submitted to the jury, and proved beyond a reasonable doubt. See United States v. Pittman, 120 F. Supp. 2d 1263, 1267 (D. Cr. 2000); United States v. Murphy, 109 F. Supp. 2d 1059, 1062-63 (D. Minn. 2000); United States v. Brown, 2000 WL 1880280, *3 (N.D.Tex. Dec. 28, 2000); Ware v. United States, 2000 WL 1827590, *2 (M.D. Tenn. Dec. 8, 2000); United States v. Johnson, 2000 WL 1801401, *2 (D. Neb. Dec. 7, 2000); West v. Untied States, 2000 WL 1790425, *2 (D. Md. Dec. 4, 2000); see also, Jones v. M.L. Smith, 231 F.3d. 1227, 1236 (9th Cir. 2000) (application of Teague to Apprendi in the context of a § 2254 petition). Since Apprendi announced a new rule of law after Movant's conviction became final ..., this Court must now examine the Teague exceptions to determine if Apprendi applied retroactively.

The first exception permits retroactive application of new rule if such rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Teague, 489 U.S. at 307. The first exception is inapplicable hee because Apprendi did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants. See Pittman, 120 F. Supp. 2d; Murphy, 109 F.Supp.2d at 1063 (D. Minn. 2000); Brown, 2000 WL 1880280 at *3; Klein v. United States, 2000 WL 1855090, *6 (D. Wyo Dec. 19, 2000);

Johnson, 2000 WL 1801401 at *2.

Under the second exception, federal courts may retroactively apply new rules of law on collateral review in cases involving "watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (Quoting Graham v. Collins, 506 U./S. 461, 478 (1993). To fall within the second exception, the new rule must satisfy a two-pronged test: (1) it must relate to the accuracy of the conviction; and (2) it must alter "our understanding of the 'bedrock procedural elements' essential to the [fundamental] fairness of a proceeding." Id. (Quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)).

The rule set forth in Apprendi, the shifting of an element of an offense from judge to jury and a requirement of proving an element beyond a reasonable doubt rather than by a preponderance of the evidence, is a rule of criminal procedure, rather than a rule of substantive law. See Brown, 2000 WL 1880280 at *4; Ware, 200 WL 1827590 at *4. Such a rule therefore does not relate to the accuracy of the conviction or sentence, nor does it implicate the fundamental fairness of the proceeding. See id, Pittman, 120 F. Supp. 2d at 1270; Klein, 200 WL 1855090 at *6; Ware, 2000 WL 1827590 at *6; Johnson, 2000 WL 1801401 at *2-3; United States v. Joseph, 2000 WL 1789989, *2 (E.D. La. Dec. 5, 2000); West, 2000 WL 179042 at *2; see also Jones, 231 F.3d at 1237-38; but see United States v. Murphy, 109 F.Supp. 2d 1059 (D.

> Minn. 2000) (finding Apprendi "grounded in fundamental fairness"). Thus this Court finds that the Apprendi rules fails to fall within the second exception.
>
> Since neither of the Teague exceptions applies, Movant is barred from collaterally attacking his sentence based on the retroactive application of the United States Supreme Court ruling in Apprendi.

Id.

Although the Eleventh Circuit has not addressed this issue, the Fourth Circuit has held that Apprendi could not be retroactively applied on collateral review. See United States v. Sanders, 247 F.23d 139 (4th Cir. Apr. 13, 2001) (Apprendi did not announce a new rule of constitutional law that fell under any exception of Teague v. Lane, 489 U. S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to permit retroactive application on collateral review); but see Dukes v. United States, __ F3d ___, 2001 WL 770531, *2 n.4 (8th Cir. July 11, 2001). Since Apprendi announced a new rule and since Apprendi was decided after Movant's conviction became final, Movant is not entitled to relief under Apprendi.

For the reasons stated above it is therefore RECOMMENDED that Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Ci. DE 1) be GRANTED.

Any person may serve and file written objections to the Report and Recommendation with the Honorable Jose A Gonzalez, Jr. within ten (10) days after being served with a copy. See 29 U.S.C. § 636(b)(1)(C). Failure to file timely

objections may limit the scope of appellate review of factual findings contained herein. See United States v. Warren, 687 F.2d 347, 348 (11th Cir. 1982) cert. denied 460 U.S. 1087 (1983).

DONE AND ORDERED in Chambers at West Palm Beach in the Northern Division of the Southern District of Florida this 31st day of August, 2001.

/s/
ANN E. VITUNAC
United States Magistrate Judge

Copies to:
David F. Pleasanton, Esq.
AUSA Diana Fernandez (FTL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed: October 9, 2002

GAETANO LOMBARDO,

Petitioner,

v.

CASE NO. 00-8195-CIV-GONZALEZ
96-8090-CR-GONZALEZ

UNITED STATES OF AMERICA,

Respondent.

ORDER

THIS MATTER has come before the Court on the Petition to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody Pursuant to 26 U.S.C. §2255 ("Petition") (Case III, DE #1)[1], filed by Gaetano Lombardo ("Petitioner"). For the reasons stated herein, the Court **ORDERS AND ADJUDGES** that the Petition is **DENIED.**

I. Procedural History and Standard of Review.

Petitioner filed the Petition on March 3, 2000, arguing that Petitioner was entitled to relief, under U.S. Const. amend. VI and 28 U.S.C. §2255, because the representation of his trial defense attorney, John F. O'Donnell ("O'Donnell"), constituted ineffective assistance of counsel on two bases: (1) O'Donnell labored under an actual conflict of interest that adversely affected his representation of Petitioner; and (2) O'Donnell failed to reduce to writing an oral

[1] The Court will refer to various docket entries of three separate cases in this Order. Each reference or citation to a docket entry will therefore indicate the case in which the entry is docketed. "Case I" refers to United States v. Rendina, No. 94 Cr. 6170 (S.D. Fla. filed Aug. 19, 1994); "Case II" refers to Petitioner's underlying criminal case, United States v. Lombardo, No. 96 Cr. 8090 (S.D. Fla. filed Sept. 12, 1996); "Case III" refers to the instant case, Lombardo v. United States, No. 00 Civ. 8195 (S.D. Fla. filed March 3, 2000).

agreement regarding Petitioner's sentence allegedly reached between O'Donnell and the Government. See Petition at 3-4. The Court referred the matter to Magistrate Judge Snow (Case III, DE #3) on March 9, 2000, and the matter was subsequently reassigned to Magistrate Judge Vitunac (Case III, DE #12) on August 16, 2000. On August 25, 2000, Petitioner filed a motion to amend the Petition (Case III, DE #15), adding a third basis for relief. There, in the wake of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), Petitioner argued that O'Donnell afforded Petitioner ineffective assistance of counsel by failing to argue during Petitioner's sentencing that Petitioner's sentence ought not be enhanced on account of conduct not charged in the indictment.

On August 31, 2001, Magistrate Judge Vitunac, after conducting evidentiary hearings and receiving oral and written argument, issued a Report and Recommendation ("R & R") (Case III, DE #42), recommending that the Petition for relief be granted on only one of Petitioner's three argued bases: that Petitioner's counsel, O'Donnell, labored under an actual conflict of interest that adversely affected his representation of Petitioner. See R & R at 11-15. On December 20, 2001, the Government filed its objections (Case III, DE #45) to the R & R, challenging that portion of the R & R that recommended that this Court grant Petitioner relief. Petitioner filed no objections to the R & R.

Title 28, section 636, provides that district courts "shall make a de novo determination of those portions of the report . . . to which objection is made." 28 U.S.C. §636(b)(1); Diaz v. United States, 930 F.2d 832, 836 (11th Cir. 1991). The Eleventh Circuit has stated that, "[a]s the use of the phrase de novo implies, the district court's consideration of the factual issue must be independent and based upon the record before the court." LoConte v. Dugger, 847 P.2d 745, 750 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988). And, "to the extent the magistrate has made findings of fact based upon the testimony of the witnesses heard before the magistrate, the district court is obligated to review the transcript . . . of those proceedings." Id. District courts "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. §636(b) (1). District courts in the Eleventh Circuit have reviewed

those portions of a magistrate's report and recommendation to which no objection has been made for clear error. See, e.g., Miller v. Singletary, 958 F. Supp. 572, 573 (M.D. Fla. 1997) (citing Gropp v. United Airlines, Inc., 817 F.Supp. 1558, 1562 (M.D. Fla. 1993).

This Court has thoroughly reviewed the entire record before it under the applicable standards of review. The Court adopts in whole that portion of the R & R that recommended denying the Petition to the extent it was premised on the grounds that Petitioner's counsel failed to reduce to writing an alleged oral agreement regarding Petitioner's sentence between Petitioner's counsel and the Government. See R & R at 15-16. The Court also adopts in whole that portion of the R & R recommending that the Petition be denied to the extent it was premised on the Supreme Court's decision in Apprendi.[2] See R & R at 16-19.

For the reasons stated herein, however, the Court rejects that portion of the R & R recommending that Petitioner be granted relief because his trial defense attorney, O'Donnell, labored under an actual conflict of interest that adversely affected his representation of Petitioner. The facts of this case that bear on this issue are complex, messy and not easily discerned from the record. The relevant law presents challenges to the analysis as well. The Court will therefore attempt to elucidate both the facts and the law of this matter as precisely as possible.

II. Background.

A. O'Donnell's Relationship with Richard F. Rendina.

This matter hinges upon the relationship between Petitioner's trial counsel, O'Donnell, and Richard F. Rendina ("Rendina"). Rendina is a disbarred Florida lawyer who spent several years working as an Assistant State Attorney for Broward County, Florida, before entering private practice in the early 1980s. While in private practice Rendina did, among other things, criminal defense work. The record is clear that, since the early 1980s, O'Donnell and

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[2] The Court notes that, subsequent to Magistrate Judge Vitunac's issuance of the R & R, the Eleventh Circuit vindicated her determination that the new constitutional role of criminal procedure announced in Apprendi does not apply retroactively on collateral review. See McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001), cert. denied, 122 S. Ct. 2362 (2002).

Rendina have been close personal and professional friends. See, inter alia, October 2, 2000 Hr'g Tr. ("Hr'g Tr. I") (Case III, DE #30) at 14-17; October 3, 2000 Hr'g Tr. ("Hr'g Tr. II") (Case III, DE #26) at 62-63. They socialized together; they and the respective families have vacationed together; the two golfed together; and, while Rendina was still a member of the bar, they shared office space with, and referred cases to, one another. See Id. O'Donnell has characterized Rendina as "more or less extended family." Hr'g Tr. I at 17. In addition, after Rendina was disbarred in 1991, O'Donnell employed him to do paralegal work on certain discrete matters. See Hr'g Tr. I at 17. Most important, however, for the analysis here, O'Donnell and Rendina consistently discussed Rendina's various legal problems, and O'Donnell consistently gave Rendina advice about the same. See Hr'g Tr. I at 16.

B. Rendina's Involvement in the Events Leading to Petitioner's Arrest.

Rendina has had several legal problems over the years. See Hr'g Tr. I at 16; Hr'g Tr. II at 44. One of them materialized on August 19, 1994, when a one-count information was filed against Rendina for making a false statement on his federal income tax return. See Case I, DE #1. Rendina pled guilty to the information on October 7, 1994. See Case I, DE #8. On April 17, 1995, Rendina was sentenced to eight months of imprisonment and one year of supervised release. See Case 1, DE #17. On June 9, 1995, Rendina was released from federal custody on bond pending an appeal of his sentence. See Case 1, DE # 46.

After being out on appellate bond for approximately a year, Rendina was contacted in the summer of 1996 by a former client, and co-defendant, of Rendina named Peter Roussonicolos ("Roussonicolos"). While engaged in law practice, Rendina had represented Roussonicolos in various criminal matters. See Hr'g Tr. II at 44. Rendina had also been indicted as a co-defendant with Roussonicolos, and others, in a drug-related case. See Hr'g Tr. II at 44-45. In the early summer of 1996, Roussonicolos told Rendina that two men with whom Roussonicolos was acquainted had expressed to Roussonicolos that they would be interested in purchasing cocaine. See Hr'g Tr. II at 45, 92. The two men had also expressed to Roussonicolos an interest in investing in a legitimate gaming venture

Rendina and others were attempting to establish in the Republic of Panama. See Hr'g Tr. II at 44. The two men about whom Roussonicolos was speaking were Petitioner, Gaetano Lombardo, and Petitioner's cousin, Franco Lombardo.

Rendina and Roussonicolos discussed what they could do with this information. Rendina suggested that he and Roussonicolos contact Roberto Collazo ("Collazo") - who, in addition to being involved in the stagnating Panamanian gaming venture with Rendina, was also known by Rendina to be a paid confidential informant, or "CI", for the Drug Enforcement Administration. See Hr'g Tr. II at 45-46. Rendina knew Collazo was a paid CI both from conversations with Collazo himself, and from discussions with Rendina's cousin, Michael Rendina, a former DEA agent.

Rendina's motives for suggesting he and Roussonicolos contact Collazo were many; civic virtue was not among them. Knowing that Collazo was a paid CI, Rendina reckoned that, if Collazo passed the information onto the Government and an arrest or a conviction materialized from it, Collazo, for whom Rendina had fronted investment money in the Panamanian gaming venture, could earn thousands of dollars.[3] See Hr'g Tr. II at 46. Rendina also hoped that, if the information led to an arrest or a conviction, Rendina would be able to persuade the DEA to speak to the Assistant United States Attorney ("AUSA") handling Rendinals pending tax-related criminal case, and convince the AUSA to file a motion to reduce Rendina's sentence. See Id. Rendina therefore hoped that passing the information onto the Government through Collazo would position Rendina both to recoup a portion of his investment in the Panamanian gaming venture and receive a sentence reduction in his tax case.

Rendina and Roussonicolos contacted Collazo, who in turn contacted the DEA and arranged for Rendina, Roussonicolos,

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[3] One method of payment for CI's is for the Government to give him or her a percentage of money seized during a so-called "reverse sting"operation. In a reverse sting, the Government arranges a mock sale of drugs between a willing purchaser, who is the target of the sting, and Government agents. Thus, for example, if the target of an investigation were to bring $250,000 to the mock drug-deal, the Government would pay the informant a percentage, sometimes up to 25%, of the money seized.

Collazo and DEA Special Agents Brett Scott ("Scott") and Louis Perez to meet at the Fort Lauderdale Airport in mid-July 1996. See Hr'g Tr. II at 91 92. At this meeting, Collazo introduced Roussonicolos and Rendina to the DEA agents, and Roussonicolos and Rendina informed the agents that they knew of two persons who might be interested in purchasing a large quantity of cocaine. See Hr'g Tr. II at 94-101. Roussonicolos and Rendina were adamant that they did not want to be CI's for the DEA and did not want to be involved in a subsequent investigation, if any, of the two individuals. See Id. Rendina did, however, tell the DEA agents that he had a "legal problem", and asked them whether, if the information led to a positive outcome for the Government, Rendina could benefit from his involvement. See Id. The agents indicated that, while such considerations were quite distant given the then present circumstances, they would be willing to speak to an AUSA on Rendina's behalf in the event that the information did in fact lead to a positive outcome for the Government. See Id. Thus transpired Roussonicolos's and Rendina's only meeting with the DEA.

While the record is not entirely clear on this point, it appears to the Court that - without the direction or involvement of the DEA and without a recording device of any kind - Roussonicolos and Rendina met with Petitioner and Franco Lombardo shortly after their meeting with the DEA agents at the Fort Lauderdale Airport. See Hr'g Tr. II at 52, 103-04. Roussonicolos introduced Rendina to the Lombardos as somebody who had contacts with potential suppliers of cocaine. See Hr'g Tr. II at 47-51. The meeting lasted only five to ten minutes, during which time the Petitioner and Franco Lombardo, without hesitation, expressed their interest in purchasing cocaine; Rendina and the Lombardos also discussed the Panamanian gaming venture. Id. Rendina represented to the Lombardos that a contact of Rendina's - a role ultimately played by Collazo - would contact the Lombardos regarding a cocaine transaction. Id. Thus transpired Rendina's only meeting with the Lombardos.

After this meeting between and among Roussonicolos, Rendina, Petitioner and Franco Lombardo, Collazo was informed that the meeting had occurred. See October 20, 2000 Hr'g Tr. ("Hr'g Tr. III") (Case III, DE #31) at 40. Collazo then contacted the DEA, and on July 22, 1996, the DEA met with Collazo to debrief him

regarding the information he possessed about Petitioner and Franco Lombardo. See Hr'g Tr. II at 95-96. On July 23, 1996 - under DEA supervision and surveillance, and wearing a recording device - Collazo met with the Lombardos for the first time, posing as the person Rendina had told the Lombardos would be contacting them. See Trial Tr. (Case II, DE #184) at 229-30. From that first meeting between Callazo and the Lombardos until the arrest of the Lombardos in a reverse sting on September 11, 1996, Collazo, working with the DEA, met with the Lombardos on multiple occasions to further the operation. After informing Collazo of their only meeting with the Lombardos, neither Roussonicalos nor Rendina had any further involvement in the investigation that led to the arrest of the Lombardos. See Hr'g Tr. II at 97-99.

On September 19, 1996, Petitioner, Franco Lombardo, and a third defendant were charged in a two-count indictment with conspiracy, and attempt, to possess with the intent to distribute cocaine in violation of 21 U.S.C. §846.[4] Several attorneys appeared on Petitioner's behalf between the date of his arrest and February 1997. In February 1997 Petitioner engaged O'Donnell to represent Petitioner at trial.

C. Events Leading up to Petitioner'S Trial.

Either before O'Donnell began representing Petitioner or soon thereafter, O'Donnell learned through his personal relationship with Rendina that Rendina had been involved in the events that led to Petitioner's arrest. See Hr'g Tr. I at 67-68. O'Donnell advised Petitioner of his close personal relationship with Rendina, and O'Donnell and Petitioner discussed the relationship on many occasions throughout the course of the representation. See Hr'g Tr. I at 24, 50. Petitioner never expressed concern to O'Donnell about O'Donnell's relationship with Rendina. See Hr'g Tr. I at 50.

Upon a stipulation signed by Petitioner, one of Petitioner's previous attorneys, and O'Donnell (Case II, DE #67), this Court signed an order on February 27, 1997, substituting O'Donnell as counsel for Petitioner in Petitioner's case (Case II, DE #68). Around

[4] The third defendant's case was severed from that of the Lombardos, and the Court, during the trial of the Lombardos, declared a mistrial as to Franco Lombardo.

the same time, the AUSA prosecuting Petitioner's case, Ms. Diana Fernandez ("Fernandez") , learned of O'Donnell's relationship with Rendina from Special Agent Scott, who had been advised of the O'Donnell-Rendina relationship by Collazo. See Hr'g Tr. III at 23, 48-49.

The relationship between O'Donnell and Rendina was first brought to this Court's attention in this case during a calendar call on February 28, 1997. Consistent with normal practice, Petitioner was not present at the calendar call. At that time, Fernandez and O'Donnell raised the O'Donnell-Rendina relationship with this Court. See May 28, 1997 Hr'g Tr. (Case II, DE #92) at 35-41; Hr'g Tr. I at 57; Hr'g Tr. III at 51-52. O'Donnell advised this Court that he and Rendina were close personal friends and that O'Donnell had employed Rendina to do paralegal work for O'Donnell after Rendina's disbarment. See Id. Fernandez and O'Donnell advised the Court that Rendina had introduced Callazo to Petitioner at the outset of the investigation that led to Petitioner's arrest. See Hr'g Tr. III at 51-52, 68-72. Fernandez indicated that, at that time, the Government had no intention to call Rendina as a witness in the case; O'Donnell indicated that he did not believe he would call Rendina either. See Id. Based on the facts presented to this Court - i.e., that O'Donnell was a close, personal friend and occasional short-term employer of an unlikely, if potential, witness in the case - this Court determined that there was no reasonable probability that O'Donnell would labor under an actual conflict of interest that would adversely affect his representation of Petitioner.

Between the February 1997 calendar call and the December 1997 trial of Petitioner, several relevant events transpired. Given the nature of the evidence against Petitioner - in particular, the recorded conversations of Petitioner openly discussing a cocaine transaction with Collazo - O'Donnell concluded that the only available theory of defense he could argue for his client was one of entrapment. See Hr'g Tr. I at 20, 45-47. O'Donnell determined that he would argue that Collazo and Rendina had grave credibility problems and stood to gain substantially from an arrest of Petitioner: Collazo, from being a paid CI; and Rendina, from receiving both a cut of the spoils from Collazo and, potentially, a reduction in his sentence. See Hr'g Tr. I at 45-50. O'Donnell also resolved to argue that Rendina and Collazo

had enticed Petitioner into the cocaine transaction by holding out to Petitioner the legitimate Panamanian gaming venture as an investment opportunity. See Id.

During his preparation for Petitioner's trial, O'Donnell telephonically interviewed Rendina on multiple occasions. See Id. Rendina unambiguously advised O'Donnell that, if he were called as a witness, his testimony would undermine an entrapment defense; Rendina stated that his testimony would "bury" Petitioner. See Hr'g Tr. I at 47. Rendina told O'Donnell that, in his one meeting with the Lombardos and Roussonicolos in July 1996, Petitioner and Rendina had frankly discussed a cocaine transaction. See Hr'g Tr. I at 48. O'Donnell likewise contacted Roussonicolos, who also indicated that his testimony would not be helpful to Petitioner. See Hr'g Tr. I at 49-50. O'Donnell therefore determined that calling either Rendina or Roussonicolos as a witness would elicit testimony that would eviscerate Petitioner's one colorable theory of defense. O'Donnell therefore resolved instead to elicit testimony in support of the entrapment defense from the Government's witnesses, such as Collazo and the DEA agents, on cross-examination and argue the entrapment defense inferentially. See Hr'g Tr. I at 48 - 49. O'Donnell testified during the evidentiary hearing regarding the Petition that he would have called Rendina as a witness if Rendina had indicated to O'Donnell that Rendina had in fact used the possibility of investing in the Panamanian gaming venture to entice Lombardo to engage in a drug transaction. See Id.

Meanwhile, Rendina did receive some consideration from the Government for his involvement in the events that led to Petitioner's arrest. After Petitioner's arrest in September 1996, Collazo contacted Special Agent Scott, and asked Scott, on Rendina's behalf, to contact the AUSA working on Rendina's tax case. See Hr'g Tr. III at 22. Special Agent Scott did so, contacting AUSA Scott Behnke ("Behnke"), and advising Behnke that Rendina had helped to introduce Collazo to Petitioner. See Id. Behnke confirmed Special Agent Scott's information with Fernandez, and on May 28, 1997, the Government filed a motion (Case I, DE #72) pursuant to Fed. R. Crim. P. 35, requesting that the court in which Rendina's tax case was pending reduce Rendina's sentence. Rendina's involvement in introducing Collazo to the Lombardos formed only part of the basis

for the Government's Rule 35 motion in Rendina's tax case; the motion was also premised upon Rendina's testifying for the Government in another criminal case, which was otherwise wholly unrelated to the instant matter. See November 28, 2000 Hr'g Tr. (Case III, DE #34) at 3-8. The Rule 35 motion was denied, however, and Rendina's sentence was not reduced.

D. O'Donnell's Representation of Petitioner at Trial.

This Court conducted Petitioner's trial in December 1997. O'Donnell, through cross examination of the Government's witnesses, endeavored to elicit testimony in support of an entrapment defense without calling Rendina or Roussonicolos as witnesses. Through cross-examination of the Government's witnesses, O'Donnell attempted to elicit, and in some instances did elicit, testimony regarding all of the following: Collazo's fulsome criminal history, his experience as a paid CI for the Government, and, most important for the instant case, Collazo's relationship with Rendina; that Collazo would be giving to Rendina a portion of the money the Government paid Collazo due to the arrest of Petitioner; that Collazo and Rendina were involved in the Panamanian gaming venture together, and that Rendina wanted to generate additional capital for it; that Rendina had recently lost substantial money in the stock market; that Rendina was a disbarred lawyer; that Rendina had a drug conviction from a case in which Rendina and Roussonicolos were co-defendants; that Rendina was, at the time of the investigation of Petitioner, on appellate bond and potentially had months of prison ahead of him for a tax-related conviction; that Rendina wanted to set up the Lombardos to try to earn a reduction in his pending prison sentence; that Rendina asked the DEA agents if they would speak to the prosecutor in his tax-related case if Rendina's involvement led to an arrest or conviction; that Rendina had met with the Lombardos, without DEA surveillance or recording, prior to Collazo's July 23, 1996 meeting with them; that Rendina had discussed the Panamanian gaming venture with the Lombardos; and that Rendina was Collazo's only connection to the Lombardos. See December 11, 1997 Trial Tr. (Case II, DE #185) at 437-60; December 15, 1997 Trial Tr. (Case II, DE #186) at 534-37, 570-72; December 16, 1997 Trial Tr. (Case II, DE #187) at 932-45.

Despite O'Donnell's efforts, after the Government's case-in-chief was completed and upon O'Donnell's motion, this Court ruled that, at that point in the trial, there was insufficient evidence in the record from which a reasonable jury could infer either that the Government had improperly induced Petitioner to commit the offense with which he was charged, or that the Petitioner had no predisposition to commit the offense. The Court therefore denied at that time O'Donnell's motion for a ruling on whether the Court would give an instruction to the jury regarding entrapment. Petitioner thereafter testified in his own defense, and O'Donnell called Collazo as a witness for the defense to attempt to elicit, again, testimony that would support an entrapment defense. After O'Donnell presented Petitioner's case, the Court granted O'Donnell's renewed motion for an instruction on entrapment. The jury, nevertheless, convicted Petitioner on both counts of the indictment, returning its verdict an December 17, 1997.

E. O'Donnell's Involvement in Rendina's Tax Case.

Petitioner was sentenced in May 1998. O'Donnell continued to represent Petitioner through the May 1998 sentencing; Petitioner's current counsel, David F. Pleasanton, took over Petitioner's representation soon thereafter, entering a notice of appearance for Petitioner on May 29, 1998. O'Donnell had been discussing Rendina's tax case with Rendina throughout its pendency. Rendina had even referred to such consultations in an affidavit signed by Rendina and appended to a May 1995 motion (Case I, DE #38) in his tax case. This May 1995 motion, while including a reference to O'Donnell by name in the affidavit appended thereto, was nevertheless signed by Rendina's counsel of record in the tax case. In addition, after Petitioner's conviction and before Petitioner's sentencing - though he never entered a notice of appearance on behalf of Rendina in Rendina's still-pending tax case, or in any other Rendina case, for that matter - O'Donnell did sign three pleadings filed in Rendina's tax case.

On February 5, 1998, and again on April 23, 1998, respectively, O'Donnell signed motions (Case I, DE #80, 82) seeking permission for Rendina, who was on supervised release at the time, to travel outside of the United States. Also on April 23, 1998,

O'Donnell signed a motion (Case I, DE #83) seeking early termination of Rendina's one year term of supervised release. The memorandum in support of the motion states, in part, as follows:

> In addition, Rendina has cooperated with the United States Attorney's office in connection with two cases, United States v. Franco Nicolleti, Case Number 96-6199-HURLEY and United States v. Franco Lombardo, Case Number 96-8090-CR-GONZALEZ, for which he has not received any credit from this Court with respect to any adjustment in his sentence.[5]

The motion to terminate Rendina's supervised release was nevertheless denied.

When O'Donnell was questioned about the pleadings signed by him that were filed in Rendina's tax case, during the evidentiary hearing held regarding the instant Petition, O'Donnell stated that he thought signing them constituted attorney-client representation. See Hr'g Tr. I at 30-32, 44-45. When questioned about the motion to terminate Rendina's supervised release, O'Donnell - based on the pleading itself, which was presented to him as an exhibit in the hearing - stated that he had "apparently" used Rendina's involvement in the investigation of Petitioner, who was still O'Donnell's client at the time, to argue for the early termination of Rendina's supervised release term. See Hr'g Tr. I at 30-32.

Rendina was also questioned about the pleadings filed in his tax case that were signed by O'Donnell. Rendina testified that - while he had discussed his tax case with O'Donnell, as he had discussed with O'Donnell all of his sundry legal problems over the years - Rendina had never retained O'Donnell, O'Donnell had never filed a notice of appearance on Rendina's behalf, and, most important, he has never considered his relationship with O'Donnell to be an attorney-client relationship. See Hr'g Tr. II at 41, 64-69. Rendina also stated that, to the extent O'Donnell's signature appeared in documents filed in Rendina's tax case, O'Donnell may have signed

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[5] The motion refers to "United States v. Franco Lombardo", but the case number given - which is that of "Case II" in this Order, No. 96 Cr 8090 - makes plain that O'Donnell was referring to the case of Petitioner, Gaetano Lombardo, and Franco Lombardo.

them as a personal favor to Rendina and at the direction of Rendina's retained counsel of record in that case. See Hr'g Tr. II at 64-69.

E. Petitioner's Argument Regarding O'Donnell's Conflict of Interest and the Magistrate's Findings.

The Petitioner argues, in essence, that O'Donnell labored under an actual conflict of interest in Petitioner's case because of the following: O'Donnell was a close personal friend of Rendina; O'Donnell represented Rendina in Rendina's tax case prior to, and concurrently with, his representation of Petitioner; Rendina was a potential witness in the case whose testimony could have established Petitioner's entrapment defense; O'Donnell did not call Rendina as a witness to ensure (1) that O'Donnell would not need to destroy his friend's credibility and reputation if Rendina became adverse while testifying and to ensure (2) that a poor performance by Rendina on the stand would not undercut Rendina's ability to use his involvement in Petitioner's case to argue for favorable treatment in his tax case. Petitioner argues, in essence, that this actual conflict adversely affected O'Donnell's representation of Petitioner because O'Donnell was unable to win an entrapment instruction without calling the Petitioner to testify.

Magistrate Judge Vitunac found that, under the totality of the circumstances of this case, O'Donnell labored under an actual conflict of interest due to his close, personal relationship with Rendina, who had a personal interest in the arrest and prosecution of Petitioner. See R & R at 12- 13. Magistrate Judge Vitunac also found that this conflict of interest adversely affected O'Donnell's representation of Petitioner because O'Donnell turned away from an alternative defense tactic - i.e., calling Rendina as a witness on entrapment - to avoid a scenario in which a poor performance by Rendina on the stand, from the Government's perspective, would have jeopardized any consideration Rendina hoped to receive from the Government in his tax case. See Id. at 14 - 15.

III. Law and Analysis.

Before the Court addresses the particular, complex issues of fact and law presented by this case, a genealogy of the Supreme Court and Eleventh Circuit law applicable to the Petition is in order.

An explication of the law applicable to a petition for a writ of habeas corpus premised on the petitioner having allegedly received ineffective assistance of counsel under the Sixth Amendment must begin, analytically if not chronologically, with the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) . There, the Supreme Court ruled that, in order for a petitioner to show that the extraordinary relief of the writ is warranted due to ineffective assistance of counsel, a petitioner must demonstrate (1) that the defense counsel's representation fell below an objective standard of reasonableness, and (2) that the deficient representation prejudiced the petitioner's defense, that is, but for counsels deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687 - 88, 694.

There is, however, an exception to this general rule. The Supreme Court has recently noted that, historically, where assistance of counsel has been denied entirely or during a critical stage of a proceeding, the Supreme Court has "spared the defendant the need of showing probable effect upon the outcome" because under such circumstances "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." Mickens v. Taylor, --- U.S. ---, 122 S. Ct. 1237, 1241-42 (2002) (citing, inter alia, United States v. Cronic, 466 U.S. 648, 658-59, 104 S. Ct. 2039 (1984)).

One instance of such exceptional circumstances was addressed by the Supreme Court in Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980), a case that predated, and was cited approvingly by, the Supreme Court's decision in Strickland. The petitioner in Sullivan, John Sullivan ("Sullivan"), was indicted together with two co-defendants for multiple first-degree murders. Sullivan, 446 U.S. at 337. Two privately retained counsel represented all three separately-tried defendants in their respective trials. Id. at 338. Sullivan was tried first, temporally speaking, and convicted of first-degree murder; Sullivan's co-defendants were each acquitted of the charges in their later trials. Id. Neither Sullivan nor his counsel objected to the joint, concurrent representation at any time. Id.

Sullivan subsequently sought collateral relief, claiming that his counsel had labored under a conflict of interest. Sullivan cited,

among other things, evidentiary hearing testimony of one of his former lawyers that Sullivan's counsel had rested Sullivan's defense after the prosecution presented its case-in-chief, because counsel did not want to expose to the prosecution defense witnesses counsel intended to call in the upcoming trials of Sullivan's co-defendants. Id. at 338-39. The Supreme Court articulated two distinct but related rules in Sullivan: (1) a trial court need not initiate an inquiry into the propriety of a joint, concurrent representation when neither client nor counsel object thereto, and the court neither knows nor reasonably should know that a particular conflict of interest exists; and (2) "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected the lawyer's performance." Sullivan, 446 U.S. at 348-49. On this second point, the Supreme Court continued, stating that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief . . . [b]ut until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. at 349-50. (citations omitted). The Supreme Court concluded on the facts of Sullivan that "the Sixth Amendment imposed upon the trial court no affirmative duty to inquire into the propriety of multiple representation," Sullivan, 446 U.S. at 348, but remanded the case for further proceedings regarding whether petitioner's counsel had labored under an actual conflict of interest that adversely affected counsel's representation. Id. at 350.

The Eleventh Circuit has elaborated upon the Supreme Court's decision in Sullivan in the intervening twenty-two years, developing the contemporary legal edifice under which this Court must analyze the instant Petition. The Eleventh Circuit laid the first blocks of this edifice in Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), cert. denied sub nom., Porter v. Dugger, 482 U.S. 918 (1987).

The petitioner in Porter v. Wainwright, Raliegh Porter ("Porter"), was convicted on two counts of premeditated murder. Porter, 805 F.2d at 931. While in pre-trial detention, Porter allegedly admitted to committing the murders with which he was charged to a fellow prisoner, Matha Thomas ("Thomas") Id. at 939. Porter's appointed counsel, an assistant public defender named Stephen

Widmeyer ("Widmeyer"), was assigned to represent Porter on August 23, 1978. Id. At that time, Widmeyer also represented, on wholly unrelated charges, Thomas, the prisoner to whom Porter allegedly confessed. Id. On September 1, 1978, Widmeyer negotiated a bond reduction for Thomas and then filed a motion to withdraw from his representation of Thomas, which was granted on September 5, 1978. Id. Thomas testified at Porter's trial against Porter, and Widmeyer cross-examined Thomas, his former client. Id. Porter was never advised that Widmeyer had formerly represented Thomas and therefore had no opportunity to object to Widmeyer's representation. Id.

Porter argued in his petition for habeas corpus, among other things, that Widmeyer labored under a conflict of interest because Widmeyer owed a continuing duty to Thomas that prevented Widmeyer from cross-examining Thomas as vigorously as possible. Id. Porter specifically argued that Widmeyer was forced to choose between impugning his former client with confidential communications, on the one hand, and forgoing vigorous cross-examination to preserve Thomas's attorney client-privilege, on the other. Id. Regarding the adverse effect upon Widmeyer's representation of Porter resulting from the alleged conflict, Porter argued that an attorney other than Widmeyer could have cross-examined Thomas about Thomas' s bond reduction, and about a possible agreement reached between Thomas and the prosecution for Thomas's testimony against Porter. Porter, 805 F.2d at 940. The Eleventh Circuit - citing, inter alia, Sullivan - stated that Porter's allegations, if true, would be sufficient to establish that an actual conflict of interest had adversely affected Widmeyer's representation of Porter; the Eleventh Circuit therefore remanded the case for an evidentiary hearing on those issues. Id. In Porter, therefore, the Eleventh Circuit extended the application of the rules announced by the Supreme Court in Sullivan - a case involving the joint, concurrent representation of separately tried, co-defendants - to a case involving the successive, if briefly overlapping, representations of a defendant and a prosecution witness, on wholly unrelated charges.

In White v. Smith, 815 F.2d 1401 (11th Cir. 1987), cert. denied, 484 U.S. 863 (1987), the Eleventh Circuit further elaborated

upon the principles implicit in its decision in Porter. The petitioner in White v. Smith, Willie Morris Smith ("Smith"), was convicted in two separate jury trials: once for assault with intent to murder and once for robbery. Smith, 815 F.2d at 1403. Smith confessed that he had acquired the rifle used in the crimes with which he was charged during an unrelated burglary that he had committed with a friend, John Cotton ('Cotton") Id. Cotton testified for the prosecution at both of Smith's trials that he had seen Smith in possession of the rifle. Id.

In support of his habeas petition, Smith pointed to evidentiary hearing testimony that Smith's counsel, Tom Payne ("Payne") , had represented Cotton on an unrelated marijuana charge as late as December 18, 1975. Id. at 1405. Payne was not appointed to represent Smith until March 19, 1976. Id. Smith argued that Payne's earlier representation of Cotton adversely affected Smith's defense because, as Smith's co-burglar of the rifle used in the crimes with which Smith was charged, Cotton was the most likely other suspect to have committed the crimes. Id. at 1404 .

Addressing Smith's petition, the Eleventh Circuit first noted that Smith must show an actual conflict of interest that adversely affected his representation. Id. (citing, inter alia, Strickland, Sullivan, and Porter) The Eleventh Circuit then stated the following:

> We will not find an actual conflict of interest unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests . . . Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical.

Smith, 815 F.2d at 1405 (quoting Barham v. United States, 724 F.2d 1529, 1532 (11th Cir. 1984), cert. denied, 467 U.S. 1230 (1984) and citing, inter alia, Porter).

Noting that Payne's representations of Smith and Cotton never temporally overlapped, the Eleventh Circuit stated that "[w]e therefore treat this case as one of successive representation rather than simultaneous representation. Of course, the absence of simultaneous representation is not determinative. In some circumstances, a defense lawyer's prior representation of a witness can give rise to an actual conflict of interest." Smith, 815 F. 2d at 1405 (citing, inter alia, Porter) The Eleventh Circuit continued, stating the following:

> This circuit's test for actual conflict - applicable to both successive and simultaneous representation - requires a showing of "inconsistent interests." We hold that in a successive representation case, mere proof that a criminal defendant's counsel previously represented a witness is insufficient to establish "inconsistent interests." In such a context, if defendant fails to show that either (1) counsels earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant, or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case, then defendant has not come even close to showing "inconsistent interests." We do not imply that proof of either substantial relationship or receipt of relevant confidential information or both would be enough to demonstrate "inconsistent interests' in a successive representation case. We merely hold that Smith has failed to show "inconsistent interests" in this case where he has failed to adduce proof of substantial relationship or relevant confidential information or any other proof of inconsistent interests.

Smith, 815 F.2d at 1405-06. The Eleventh Circuit therefore affirmed the district court's denial of habeas relief for Smith. Id.

In Freund v. Butterworth, 165 F. 3d 839 (11th Cir. 1999) (en banc) , cert. denied, 528 U.S. 817 (1999), the Eleventh Circuit again elaborated upon its understanding of Sullivan as articulated in Smith. The petitioner in Freund v. Butterworth, John Freund ("Freund"), was convicted of first-degree murder. Freund, 815 F.2d at 841. In his habeas corpus petition, Freund argued that his defense counsel, two retained attorneys in a firm, had labored under an actual conflict of interest that adversely affected their representation of Freund because - prior to commencing their representation of Freund, over the course of thirteen years, and in unrelated criminal matters - the two attorneys had represented a separately-tried, non-testifying co-defendant of Freund named John Trent ("Trent"). Id. at 841. Freund's counsel had also briefly represented, on an unrelated drug charge, a prosecution witness against Freund named Eleanor Mills ("Mills"). Id. at 846.

In Freund, the Eleventh Circuit described Sullivan as requiring a petitioner to demonstrate two distinct elements in order to establish entitlement to habeas relief: (1) an actual conflict of interest that (2) adversely affected the petitioner's representation. See Freund, 165 F.3d at 858 (citing Sullivan, 446 U.S. at 350) The Eleventh Circuit then declared that, "[w]e hold and reaffirm that Smith articulates this circuit's test for proving an 'actual conflict' in the successive representation context." Freund, 165 P. 3d at B59 (citing Smith, 815 F. 2d at 1405-06). The Eleventh Circuit clarified that, "[a]n 'actual conflict' occurs when a lawyer has 'inconsistent interests' " and that, "[i]n order to prove that an 'actual conflict', hindered petitioner's lawyer's performance, petitioner must make a factual showing of inconsistent interests' or point to specific instances in the record to suggest an actual impairment of his or her interests.' " Freund, 165 F. 3d at 859 (quoting Smith, 815 F. 2d at 1404-05). The Freund court continued, "at a minimum, petitioner must show" either (1) substantial relatedness between the successive representations or (2) the learning of relevant confidential information in the prior representation, but even proof of both "may not necessarily be enough to demonstrate 'inconsistent interests' in a successive representation case." See Id. ; see also, supra at 29-30. The Eleventh Circuit further clarified that, "once the former client, petitioner,

proves that the subject matters of the present and prior representations are 'substantially related,' the court will irrebutably [sic] presume that relevant information was disclosed during the former period of representation." See Id. (citations omitted).

Regarding what the Eleventh Circuit termed Sullivan's "adverse effect prong," the Freund court stated that the rule in the Eleventh Circuit is and continues to be as follows:

> To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to "some plausible alternative defense strategy or tactic that might have been pursued." Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. . . . Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

Freund, 165 F. 3d at 860 (internal citations omitted) (citing Strickland, Porter, and United States v. Fahey, 769 F. 2d 829, 836 (1st Cir. 1985)).

In applying Smith to the facts presented in Freund, the Eleventh Circuit noted that, "[a]lthough Smith speaks of a 'witness,' we find no reason not to extend its rule to non-testifying, separately-tried codefendants (e.g., Trent)." See Freund, 165 F. 3d at 859, n.31. The Eleventh Circuit found that Freund had failed to establish either an actual conflict or, even assuming one, an adverse effect on his representations stemming from his counsel's prior representations of Trent or Mills. See Id. at 862-69.

The Eleventh Circuit's current understanding of Sullivan - as evidenced by, inter alia, Porter, Smith, and Freund - can therefore be summed up as follows. A petitioner can demonstrate that an actual

conflict of interest adversely affected his representation under two distinct sets of circumstances: (1) where petitioner's counsel concurrently represented ("concurrent" encompassing not only joint representations in the same matter, but also temporally overlapping representations in unrelated matters) the petitioner, on the one hand, and either a co-defendant of, or prosecution witness against, the petitioner, on the other; or (2) where petitioner's counsel successively represented ("successive" understood as not temporally overlapping) petitioner and either a co-defendant of, or prosecution witness against, the petitioner. In both contexts, the petitioner must demonstrate two elements: (1) actual conflict and (2) adverse effect. In both contexts, to establish an actual conflict of interest, a petitioner must point to specific instances in the record demonstrating that petitioner's counsel had to choose between "inconsistent interests" - i.e., a choice between possible alternative courses of action that would have inured to one client's benefit and another client's detriment, or vice versa. See Reynolds v. Chapman, 253 F. 3d 1337, 1343 (11th Cir. 2001) (citing Smith, 815 F. 2d at 1404); see supra at 27-28. In both contexts, a petitioner must establish that the actual conflict of interest adversely affected his representation - i.e., that his counsel might have pursued a alternative, reasonable trial strategy or tactic and did not because doing so conflicted with his external loyalties. See Reynolds, 253 F. 3d at 1343 (citing Freund, 165 F. 3d at 860); see supra at 31. In the successive representation context, however, a petitioner has the additional burden, in order to establish an actual conflict of interest, of demonstrating, at a minimum, either a substantial, particular relationship between the successive representations or the learning of confidential information in the prior representation that was relevant to the subsequent representation. See Freund, 165 F.3d at 859; Smith, 815 F. 2d at 1405-06.

This Court notes, however, that the Supreme Court, in its March 2002 opinion in Mickens v. Taylor, called into question the integrity of the post-Sullivan superstructure constructed in this and other circuits. An examination of Mickens is therefore essential here. The petitioner in Mickens v. Taylor, Walter Mickens ("Mickens"), was convicted of premeditated murder. See Mickens, 122 S. Ct. at 1239. In his habeas corpus petition, Mickens argued that one of his

court appointed attorneys, Bryan Saunders ("Saunders"), had labored under an actual conflict of interest at trial because Saunders had previously represented Mickens's victim, Timothy Hall ("Hall"), on unrelated assault and concealed weapons charges. Id. at 1240. Saunders was appointed to represent Hall on March 20, 1992, and Saunders met with Hall on one occasion for 15 to 30 minutes between March 20 and March 30, 1992, when Hall's body was found. Id. The charges against Hall were dismissed on April 3, 1992, the presiding court noting on the docket that the defendant was deceased. Id. Saunders was appointed to represent Mickens on April 6, 1992. Id. Neither Mickens nor Saunders's co-counsel were aware that: Saunders had represented Hall, and Mickens did not object to Saunders's representation prior to trial. Id.

The Fourth Circuit, sitting en banc, relied on Sullivan and held that Mickens had to show "both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known." Mickens, 122 S. Ct. at 1340 (quoting Mickens v. Taylor, 243 F. 3d 348, 355-56 (4th Cir. 2001) (en banc)) (emphasis added). The Fourth Circuit concluded that Mickens had demonstrated an actual conflict but had failed to demonstrate an adverse effect on his representation therefrom, and affirmed the district court's denial of habeas relief. Id. The Supreme Court granted certiorari to address "what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict about which it knew or reasonably should have known." Mickens, 122 S. Ct. at 1239.

In Mickens the Supreme Court clarified two issues germane to this Court's analysis of the Petition. First, even if a trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a petitioner alleging, on collateral review, a Sixth-Amendment, ineffective-assistance-of-counsel violation premised on such conflict must nevertheless demonstrate that the conflict was an actual conflict that adversely affected his counsel's representation. See Mickens, 122 S. Ct. at 1245. A district court's failure to inquire under such circumstances does not therefore entitle the petitioner to automatic relief.

Second, the Supreme Court made clear that "the Sullivan standard is not properly understood as requiring inquiry into actual conflict as something separate and apart from adverse effect. An actual conflict for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performances." Id. at 1244, n.5 (emphasis added). The Sullivan-mandated inquiry is therefore a one-part inquiry - that is, an inquiry into the "adverse effect" of a conflict of interest - not a two-part inquiry.

In addition to these two express clarifications, the Supreme Court also stated the following about the application of Sullivan to cases other than those involving joint, concurrent representations:

> Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the Sullivan rule that deficient performance of counsel must be shown. The case was presented and argued on the assumption that (absent some exception for failure to inquire) Sullivan would be applicable - requiring a showing of defective performance, but not requiring in addition (as Strickland does in other ineffective-assistance-of-counsel cases), a showing of probable effect upon the outcome of trial. That assumption was not unreasonable in light of the holdings of Courts of Appeals which have applied Sullivan unblinkingly to all kinds of alleged attorney ethical conflicts. They have invoked the Sullivan standard not only where (as here) there is a conflict rooted in counsel's obligations to former clients, but even when representation of the defendant somehow implicates counsel's personal or financial interests . . . . .

Mickens, 122 S. Ct. at 1245 (internal quotations and citations omitted) (emphasis original).

The Supreme Court continued, [i]t must be said, however, that the language of Sullivan itself does not clearly establish, or indeed even support, such expansive application." Id. (emphasis added). The

Supreme Court emphasized Sullivan's language that, "[u]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. (quoting Sullivan, 446 U.S. at 350) (emphasis added in Mickens). The Supreme Court also cited Fed. R. Crim. P. 44(c) - which requires a trial court to inquire into potential conflicts of interest in joint, concurrent representations, but not successive representations involving substantially related matters - as another instance in which the judicial system treats the circumstances differently. Id. at 1245-46. While acknowledging that an attorney's ethical duties are no more or less important in the two circumstances, the Mickens Court stated that, "the purpose of our . . . Sullivan exception[ ] from the ordinary requirements of Strickland is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Stickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Id. at 1246 (citing Nix v. Whiteside, 475 U.S. 157, 165, 106 S. Ct. 988 (1986)). Despite all of the forgoing commentary, the Supreme Court nevertheless left unaddressed the question of whether Sullivan does in fact apply to cases involving successive representations. Id.

This Court's research has revealed only two cases, as of the time of the drafting of this Order, in the Eleventh Circuit that have cited Mickens v. Tavlor: (1) Brownlee v. Haley, --- F. 3d ---, 2002 WL 31050882 at *18, n.17 (11th Cir. Sept. 16, 2002) (quoting Mickens, 122 S. Ct at 1245 as the standard for assessing conflicts of interest on collateral review and citing Freund for the test regarding "adverse effect") and (2) Hernandez v. Spears, No. 00- 3059, 2002 WL 1205059 at *5 (S.D. Fla. May 9, 2002) (quoting Mickens, 122 S. Ct. at 1244, n.5, and stating that Mickens rejected the conceptual separation between "actual conflict" and "adverse effect"). This Court therefore finds itself in at least partially unchartered waters, without full Eleventh Circuit guidance regarding the extent to which its Sullivan-related jurisprudence has been modified by Mickens.

Because (1) the question addressed by the Supreme Court in Mickens was "what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict about which it knew or reasonably should have

known" Mickens, 122 S. Ct. at 1239, and (2) five justices joined in the majority-opinion[6] addressing that question, this Court has determined that it is compelled to follow Mickens and reject the conceptual distinction between "actual conflict" and "adverse effect" articulated in the Eleventh Circuit's line of cases, including White v. Smith, Freund v. Butterworth, and Reynolds v. Chapman. This Court will reconcile the Supreme Court's rejection of this conceptual distinction with the existence of independent tests for determining "actual conflict" and "adverse effect" in the Eleventh Circuit in the following manner. This Court will find the constitutional predicate for habeas relief if Petitioner can demonstrate that O'Donnell (1) concurrently or successively represented Petitioner and Rendina, and (2) O'Donnell's representation of those two individuals created a conflict of interest that "adversely affected" O'Donnell's representation of Petitioner, using the Eleventh Circuit's standard for determining "adverse effect." in other words, because, as the Supreme Court has stated, "[a]n actual conflict for Sixth Amendment purposes, is a conflict of interest that adversely affects counsels performance," Mickens at 1244, n.5 (emphasis added), this Court adopts the rule that if (1) a petitioner's counsel represented the petitioner and another person[7], and (2) the petitioner can establish that the two representations created a conflict of interest that "adversely affected", as defined by the Eleventh Circuit, counsels representation of petitioner, then the petitioner will be entitled to relief under the Sixth Amendment. This rule accords the fullest possible respect to the law of both the Supreme Court and the Eleventh Circuit on this issue. In addition, because the Supreme

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[6] Justice Scalia wrote the opinion for the Court in which Justices Rehnquist and Thomas joined. Justice Kennedy wrote a concurring opinion, in which Justice O'Connor joined, where he expressly joined the Court's opinion in full, and stated that he wrote separately only to opine on a question upon which the Court had not granted certiorari.

[7] The Court notes that in the jurisprudence of the Supreme Court and Eleventh Circuit the other "person" has been one of the following: a separately-tried, non-testifying co-defendant of the petitioner (e.g., Sullivan and Freund) a testifying witness against the petitioner (e.g., Porter and White); and a victim of the petitioner's crime (e.g., Mickens). Rendina was none of the above, but rather a potential witness who was never called for or against Petitioner. Because Petitioner argues that O'Donnell's decision not to call Rendina is the essential basis of the "adverse effect" on O'Donnell's representation of Petitioner, the Court rules that Sullivan and its progeny ought to apply to this case.

Court expressly reserved the question of whether Sullivan applies to successive representation cases - the Justices' critique of such application of Sullivan notwithstanding - this Court has determined that it is compelled to follow the Eleventh Circuit's pronouncements on the applicability of Sullivan in such cases, including those pronouncements in Porter, Smith and Freund.

One potential objection to the rule adopted by this Court is that the rule might neglect the distinction the Eleventh Circuit has drawn - in, inter alia, Smith and Freund between concurrent and successive representation cases. The Eleventh Circuit has held that petitioners in successive representation cases must establish, at a minimum, either a substantial relationship between the representations or the learning of relevant confidential information in the prior representation to meet the test for "actual conflict". See supra at 28-29, 31. One might therefore object that this Court's rule, by reducing the inquiry to an analysis of the case under the Eleventh Circuit's "adverse effect" test, will open the door for a petitioner to use his counsel's prior representation of another person in a wholly unrelated matter as a basis for habeas relief.

The Court believes such an objection would be ill-founded. As noted supra at 31-32, the Eleventh Circuit's test for determining adverse effect is the following:

> To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to "some plausible alternative defense strategy or tactic that might have been pursued." Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. . . . Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

Freund, 165 F. 3d at 860; see also, Reynolds, 253 F. 3d at 1343 (citing Freund). Requiring petitioners to satisfy the third element of Eleventh Circuit's "adverse effect" test will fully ensure that

petitioners in successive representation cases demonstrate the requisite nexus between the prior representation and the representation of the petitioner. Such a petitioner, like petitioners in concurrent representation cases, must prove a link between his counsel's representation of another person and his counsel's decision to forgo a reasonable, alternative trial strategy or tactic. Or, otherwise stated, petitioners must prove that the representations were "inherently in conflict." This element of the Eleventh Circuit's "adverse-effect" test fully ensures that all petitioners (those in both concurrent and successive representation cases) will he required to meet a standard consistent with that required by the Eleventh Circuit's pre-Mickens, two-part inquiry into "actual conflict" and "adverse effect." The Court cannot envision a case in which a petitioner in a successive representation case could successfully prove all three elements of the Eleventh Circuit's "adverse effect" test and not also be able to satisfy the Eleventh Circuit's pre-Mickens test for "actual conflict" in successive representation cases. In short, requiring a petitioner to prove (1) his counsel represented another person and (2) that representation created to a conflict of interest that "adversely affected" his counsel's representation of petitioner is a clear rule that is consistent with both the Supreme Court's decision in Mickens and the Eleventh Circuit's decisions in Smith and Freund.

Having determined what standard the Court ought to apply to the instant Petition, this Court now turns to the particular issues raised by it. In light of the forgoing, there are two questions this Court must resolve in addressing the Petition: (1) Did O'Donnell ever represent Rendina?; and (2) if so, has the Petitioner demonstrated that the representation created a conflict of interest that "adversely affected" O'Donnell's representation of Petitioner.

Regarding the first question, this Court finds that O'Donnell never represented Rendina. The record is clear that O'Donnell and Rendina were and are close personal friends. The two routinely discussed, as friends, Rendina's various legal problems, and O'Donnell offered Rendina his advice about the same. And, O'Donnell did sign three pleadings filed on Rendina's behalf in Rendina's tax case, including one that argued for early termination of Rendina's supervised release - based, in part - on Rendina's involvement in the events that led to Petitioner's arrest.

But, O'Donnell has never entered a notice of appearance on behalf of Rendina, and Rendina has never retained O'Donnell as an attorney. Rendina also testified that O'Donnell may well have signed the pleadings as a personal favor to Rendina and at the direction of Rendina's counsel in that case. Moreover, and most important, Rendina testified unequivocally that he has never considered O'Donnell to be his attorney. See supra at 19-20. This is crucial. Under Florida law, the test for determining whether an attorney-client relationship exists is a subjective one, and "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional advice." Florida Bar v. Beach, 675 So. 2d 106, 109 (Fla. 1996) (citations and internal quotations admitted); see also, Keepsake. Inc. v. P.S.I. Indus., 33 F. Supp.2d 1033, 1036 (M.D. Fla. 1999) (citing Beach). Rendina routinely consulted with O'Donnell as his friend, but never as his attorney. Therefore, no attorney-client relationship has ever existed between them, and O'Donnell therefore never represented Rendina. Logic dictates that, if O'Donnell has never represented Rendina, O'Donnell never actively represented Petitioner and Rendina, either concurrently or successively. O'Donnell therefore could not have labored, and did not labor, under a conflict of interest for Sixth-Amendment purposes. See Mickens, 122 S. Ct. at 1245, and Sullivan, 446 U.S. at 350. Because the Petitioner has failed to establish this essential predicate to his entitlement to relief, the Petition must be denied.[8]

Even assuming that Petitioner could demonstrate that O'Donnell had represented both Petitioner and Rendina, which Petitioner cannot do and has not done, Petitioner would not be able

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[8] It must be said, in addition, that contrary to Judge Vitunac's finding in the R & R (see supra at 21) nothing in either the Supreme Court's or Eleventh Circuit's jurisprudence regarding this issue suggests that a personal relationship, however intimate - as opposed to an attorney-client relationship, concurrent or successive - can give rise to a conflict of interest for a Sixth-Amendment, ineffective-assistance-of-counsel claim. This rule of law is not only made clear by Supreme Court's and Eleventh Circuit's decisions, but it is also sound public policy. Given the close-knit nature of many legal communities - in small- and moderately-sized towns, as well as some larger ones - precluding defense counsel from representing defendants when counsel have a personal, as opposed to an attorney-client, relationship with a co-defendant, a witness or a potential witness would not advance the purpose of the Sixth Amendment's right to counsel, which is to ensure that defendants receive fair trials.

to establish that doing so led to an actual conflict of interest, that is, a conflict that adversely affected O'Donnell's representation of Petitioner. Assuming for the sake of argument only, that the consultations between O'Donnell and Rendina regarding Rendina's tax case throughout the pendency of that case constituted an attorney-client relationship, and, therefore, that O'Donnell concurrently represented Petitioner and Rendina, Petitioner would nevertheless not be entitled to relief.

Petitioner argues that O'Donnell's decision not to call Rendina as a witness ultimately forced O'Donnell to put Petitioner on the witness stand in his own defense so that O'Donnell could elicit sufficient testimony for this Court to give the jury an instruction on entrapment. Petitioner argues that this adversely affected Petitioner's representation. Petitioner's argument fails for several reasons.

In order to prove adverse effect Petitioner must establish: (1) that O'Donnell might have pursued an alternative trial strategy or tactic; (2) that the alternative was reasonable under the circumstances; and (3) that O'Donnell did not pursue it because doing so conflicted with his external loyalty to Rendina. See Reynolds, 253 F.3d at 1343 (citing Smith, 815 F.2d at 1404). Again, assuming for the sake of argument only that O'Donnell had represented Rendina, Petitioner could not satisfy the Eleventh Circuit's adverse effect test.

Calling Rendina as a witness was not a reasonable alternative for O'Donnell. The Government had extensive evidence - including, among other things - audio recordings from Petitioner's meetings with Collazo establishing that Petitioner had knowingly taken part in a transaction to purchase a large quantity of cocaine. Petitioner was arrested in the midst of the reverse-sting operation. This was clearly not a case of mistaken identity. The only colorable theory of defense O'Donnell could argue for Petitioner was a defense of entrapment. O'Donnell knew full well from his conversations with Rendina that Rendina's testimony would have completely undermined the only theory of defense available to Petitioner. Knowing this, calling Rendina as a witness would have been foolhardy, not reasonable.

O'Donnell instead attempted to put before the jury a theory of defense that Rendina had induced Lombardo to engage in a cocaine

transaction by holding out the Panamanian gaming venture as an investment opportunity. O'Donnell was able, in cross-examining Collazo and Special Agent Scott, to put before the jury Rendina's many motives for attempting to entrap Petitioner, and O'Donnell spared no aspect of Rendina's personal reputation in the process. O'Donnell also attempted to insinuate over and over again that Rendina had induced Petitioner to engage in the drug transaction in meetings not monitored by the DEA. The surest way for O'Donnell to shatter the theory he was advancing would have been to call as a witness the person upon whom O'Donnell was pinning the entrapment, in absentia, and have that person testify that Petitioner had eagerly discussed a drug transaction with him. Instead, O'Donnell assassinated Rendina's character, blamed him for the entrapment, and never gave Rendina the opportunity to undermine the theory.

Petitioner likewise could not prove that O'Donnell's decision not to call Rendina as a witness was owing to any external loyalty to Rendina. As noted, O'Donnell showed no compunction about attacking Rendina's character at Petitioner's trial. In addition, that O'Donnell did not call Rendina because doing so would have undermined Petitioner's defense and not because of any loyalty to Rendina is made clear by the fact that O'Donnell did not call Roussonicolos as a witness either. Roussonicolos was also present with Rendina for the one meeting Rendina had with Petitioner. O'Donnell had no significant relationship with Roussonicolos whatsoever, personal or professional. If O'Donnell had determined that attempting to elicit testimony of what transpired at Rendina's meeting with Petitioner would have supported the entrapment defense, O'Donnell could have called Roussonicolos. But, Roussonicolos, like Rendina, had informed O'Donnell that his testimony would not support an entrapment defense. The record is clear that O'Donnell did not call Rendina because doing so would not have been a reasonable trial tactic, not because of any conflicting loyalty O'Donnell felt toward Rendina. Therefore, even assuming that Petitioner could demonstrate that O'Donnell had ever represented Rendina, Petitioner could not establish that such a hypothetical representation created an actual conflict of interest that adversely affected O'Donnell's representation of Petitioner.

IV. Conclusion.

This Court has determined that, under the law of the Eleventh Circuit understood in light of the Supreme Court's decision in Mickens v. Taylor, Petitioner was required to demonstrate that his trial counsel, John O'Donnell, had represented Richard Rendina and that the representation created a conflict of interest that adversely affected O'Donnell's representation of Petitioner. Petitioner has failed to demonstrate that O'Donnell has ever represented Rendina, and even if Petitioner could demonstrate such a representation, Petitioner could not demonstrate that such a representation created an actual conflict of interest that adversely affected O'Donnell's representation of Petitioner.

Again, the Court has adopted in full those portions of the Magistrate's Report & Recommendation that recommended denying the Petition on Petitioner's other two argued bases for relief. Having found the remaining argued basis for relief to be without merit, the Court **ORDERS AND ADJUDGES** that the Petition is **DENIED.**

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this **9th** day of October, 2002.

/ S /
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

CC: Counsel

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-16246
Non-Argument Calendar

D.C. Docket Nos. 00-08195-CV-JAG
96-08090-CR-JAG

FILED MAY 6, 2003

GAETANO LOMBARDO,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 6, 2003)

Before, ANDERSON, BLACK and CARNES Circuit Judges

PER CURIAM:

Gaetano Lombardo appeals the district court's denial of his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255, in which he claimed that his conviction and sentence for conspiracy to distribute cocaine and for possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841 (a)(1) and 846 should be vacated because his defense counsel Jack O'Donnell, was ineffective because he labored under an actual conflict of interest that adversely affected his representation of Lombardo. The district court granted a certificate of appealability on the following issues:

> (1) whether - and, if so, to what extent - the Supreme Court's decision in Mickens v. Taylor modified the Eleventh Circuit's post-Sullivan jurisprudence regarding what a petitioner must demonstrate to establish entitlement to habeas corpus relief on the grounds that the petitioner's counsel labored under an actual conflict of interest that adversely affected petitioner's representation, thus depriving petitioner of effective assistance of counsel under the Sixth Amendment; and (2) whether or not, under the appropriate post-Mickens standard determined by the Eleventh Circuit, petitioner's counsel labored under an actual conflict of interest that adversely affected petitioner's representation.

The district court concluded that the following statement from Mickens may have undermined our circuit's current two-part inquiry in conflict of interest cases, under which a petitioner must first show an actual conflict of interest and then show that the actual conflict adversely affected his representation: "[T]he Sullivan standard is not properly read as requiring inquiry into

actual conflict of interest as something separate and apart from adverse effect. An 'actual conflict.' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." 535 U.S. 162, 122 S.Ct. 1237, 1244 n.5 (2002). We conclude that the analytical refinements, if any, which the Mickens opinion may require in conflict of interest law are irrelevant to the disposition of this case. Whenever it may enter into the analysis, an adverse impact on counsel's performance is required in post-Mickens law, just as it was required in our circuit's law before that decision. Before being entitled to relief on conflict of interest grounds, Lombardo must still show that the conflict he claims that his trial counsel O'Donnell suffered did adversely affect O'Donnell representation of him. Lombardo has failed to do that.

For purposes of this appeal, we assume that O'Donnell had a personal friendship with Richard Rendina, had employed him in the past, and had represented him in another legal matter. To establish the requisite adverse affect, Lombardo must show: "(a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." Reynolds v. Chapman, 253 F.3d. 1337, 1343 (11th Cir. 2001) (citation omitted).

Lombardo was caught red-handed in a "reverse sting" operation. The government produced strong evidence, including tape recordings of Lombardo talking about the drug deals, that he knowingly participated in a transaction to purchase a large amount of cocaine. Lombardo's defense at trial - and, as he concedes, his only plausible defense - was entrapment. Lombardo claimed that Rendina and another man, Peter Roussonicolos, had enticed him into the cocaine deal by holding out to him a legitimate Panamanian gaming venture as

an investment opportunity. Lombardo asserts that O'Donnell's decision not to call Rendina as a witness was a direct result of his relationship with Rendina and that the decision prejudiced his entrapment defense because he was forced to testify in order to obtain a jury instruction on entrapment.

It would not have been reasonable for O'Donnell to call Rendina as a witness. O'Donnell interviewed Rendina in connection with the entrapment defense, and Rendina told him unequivocally that his testimony would be unhelpful. What Rendina told O'Donnell was borne out by Rendina's testimony at the evidentiary hearing on the present motion: Rendina testified that Lombardo did not express any hesitation about being involved in the drug transaction. O'Donnell also did not call Roussonicolos, who had also indicated his testimony would be unhelpful to an entrapment defense, and instead chose to elicit testimony in support of an entrapment defense through cross-examination of the government's confidential informant. Given Rendina's statements to O'Donnell about what his testimony would be, the course of action O'Donnell chose was the only reasonable one. It would not have been reasonable for O'Donnell to call Rendina as a witness when the result of doing so would have been to undermine Lombardo's only viable defense.

Moreover, there is nothing to indicate that O'Donnell's decision not to call Rendina was based on loyalty to him. To the contrary, when questioning the government's confidential informant, O'Donnell elicited testimony relating to Rendina's motives to entrap Lombardo and that testimony was harmful to Rendina's reputation. O'Donnell also chose not call Roussonicolos, with whom he had no relationship. Therefore, any conflict of interest created by O'Donnell's relationship with Rendina did not adversely affect his representation of Lombardo. The conflict of interest claim fails post-Mickens,

just as it would have failed pre-Mickens.

AFFIRMED.